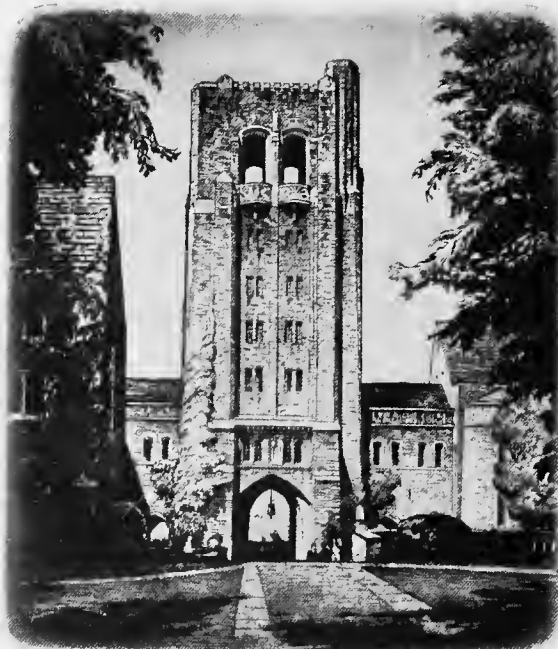


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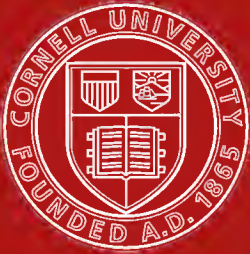
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LEADING CASES

UPON

THE LAW OF WILLS

SELECTED BY

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LEADING CASES

UPON

THE LAW OF WILLS.

I. MENTAL CAPACITY TO MAKE A WILL.

(45 N. J. Eq. 173, 16 Atl. Rep. 690.)

WADDINGTON v. BUZBY.

(*Court of Errors and Appeals of New Jersey.*
Feb. 1, 1889.)

1. TESTAMENTARY CAPACITY.

A person who is aged, infirm, and almost blind may make a valid will, if capable of recollecting the property she is about to dispose of, understanding the manner of distributing it as therein set forth, knowing the objects of her bounty, and the nature of the business in which she is engaged.

2. SAME.

Testatrix was 83 years of age, feeble and somewhat blind, forgetful to the extent that such aged persons usually are, but she went about the house, knew the members of the family, talked about her business affairs, remembered the amount of her property and where it was invested, objected to the reduction of the interest on her investments, took part in the routine of the house and the payment of bills, and conversed with visitors whom she knew. *Held*, that she had testamentary capacity.

3. SAME—FRAUD AND UNDUE INFLUENCE—RELATIONSHIP OF DRAUGHTSMAN.

The facts that the draughtsman of the will is sole executor, and his wife and son are favored legatees, will not invalidate the will, where there is no more direct and certain evidence of fraud or undue influence, and the testatrix had excluded other relatives in a former will, and had given good reasons therefor, and the draughtsman, who was her nearest relative upon whom she could rely, had advised her in the care of her property, and assisted her in her business.

KNAPP and PATERSON, JJ., dissenting.

Appeal from prerogative court; MCGILL, Ordinary. 43 N. J. Eq. 154, 10 Atl. Rep. 862.

A written instrument alleged to be the last will and testament of Ruth W. Buzby was offered to the orphans' court of Salem county for probate, by George G. Waddington, executor therein named, and probate was refused on objections raised by Nathan W. Buzby. On appeal the order refusing probate was affirmed by the ordinary, and the proponent appealed to this court.

W. T. Hilliard and W. E. Potter, for appellant. C. H. Sinnickson, for appellee.

SCUDDER, J. A careful consideration of the facts in this case has changed my first impression, and led me to a different result from that reached in the courts which have made the prior examinations of the questions presented. It appears, in my judgment, that sufficient weight has not been given to the extent of the right which the law gives to the owners of property to dispose of it by will, the moderate capacity required for the exercise of this right, and the aid they may invoke from others in giving order and legal form to their wishes without subjecting them to the charge of fraud and undue influence. At the date of this writing and its execution, April 20, 1882, Ruth W. Buzby was about 83 years old, and she died in 1886. She was feeble and forgetful to the extent that persons ordinarily are at such an advanced age, and she was nearly blind, so that she could not read, or did so with difficulty. But she could at that time go about the house, knew the members of the family, talked about her business affairs, remembered the amount of her property and where it was invested, objected to the reduction of the percentage of interest, took a part in the routine of the house and the payment of bills, and conversed with visitors whom she knew. She had been an intelligent woman, but not of very strong will, rather reticent than talkative, and became more silent and absent-minded as she grew old. She was injured by a fall, and failed in physical and mental strength from that time gradually until her death. The opinions of witnesses as to her mental capacity are of no weight unless sustained by facts on which such opinions are founded; and those who saw her seldom, or but once, and say she was silent, and appeared absent-minded, give little aid in determining this question. *Lowe v. Williamson*, 2 N. J. Eq. 82; *Sloan v. Maxwell*, 3 N. J. Eq. 581; *Whitnack v. Stryker*, 2 N. J. Eq. 8; *Andress v. Weller*, 3 N. J. Eq. 605; *Stackhouse v. Horton*, 15 N. J. Eq. 202; *Pancoast v. Gra-*

ham, Id. 294; *Stevens v. Vancleve*, 4 Wash. C. C. 262; *Den v. Vancleve*, 5 N. J. Law, 589; *Harrison v. Rowan*, 3 Wash. C. C. 580; *Turner v. Cheesman*, 15 N. J. Eq. 243; *Edy's Case*, 32 N. J. Eq. 701, 33 N. J. Eq. 574; *Collins v. Osborn*, 34 N. J. Eq. 511; and others that might be cited,—are cases in our state where persons who were aged, diseased, blind, and infirm have executed wills, and the rule of capacity by which they may be sustained has been enunciated.

It is shown to my satisfaction that the testatrix, at the time she executed this writing, was capable of recollecting the property she was about to dispose of, understanding the manner of distributing it therein set forth, the objects of her bounty, and the nature of the business in which she was engaged. If so, she had the requisite testamentary capacity. The paper was in fact executed by her as her last will and testament, in the presence of two witnesses present at her house at the same time. The attesting clause does not say that they signed in the presence of the testatrix. One of these subscribing witnesses is dead; the other is living, but does not remember the circumstances. He is certain as to his signature, and that of the other witness is proved by his son. It is shown by the testimony of the other two persons who were present at the signing of the paper that they were all together in the dining-room when she signed and requested them to sign as witnesses to her will. This completes the attestation. It also appears that the will was read to her before signing. She took the will after execution, herself, upstairs, put it in a box with her other papers in a drawer of her room where she slept, and it remained in her possession until her death, about five years after its date. Of the fact of its due execution, and her capacity to make it, there seems to me to be satisfactory proof offered.

The more serious question in the case is whether Ruth W. Buzby executed this writing, purporting to be her last will and testament, through the undue influence of George G. Waddington, the proponent. The influence that will vitiate a will must be such as in some degree destroys the free agency of the testator, and constrains him to do what is against his will, but what he is unable to refuse, or too weak to resist. 1 Jarm. Wills, § 37; *Lynch v. Clements*, 24 N. J. Eq. 431; *Moore v. Blauvelt*, 15 N. J. Eq. 367.

It is claimed that this appears in several particulars. The proponent wrote the will, in which he was made sole executor, and his son and wife were favored legatees. In *Rusling v. Rusling*, 35 N. J. Eq. 120, 36 N. J. Eq. 603, it was said that the fact that the will was drawn by a favored legatee, while it calls for suspicious scrutiny of the circumstances, does not, of itself, invalidate the will. The same rule would apply where the legacies were given, not to himself, but to those who stand in such near relationship to him as a son and wife. We must therefore look for other circumstances. Each case must be judged by its own circumstances, and no general rule can be made applicable to

all cases. The testatrix had three children,—Mary Buzby, Beulah Gaskill, and Nathan Buzby. The son had died some years before her death, leaving a son of the same name, who is the caveator against the probate of this will. Mary Buzby lived with her mother until she died, on March 29, 1882. She cared for her in their home, aided her in the management of her property, but there is no evidence that she exercised undue influence over her. Her entire property was the sum of \$5,200 invested in bonds and mortgages, and some household furniture of no great value. Some years before her death she made a will by which she bequeathed \$1,200 to Beulah Gaskill, and the residue to Mary Buzby. That will was drawn by Aaron Fogg, a neighbor. On the evening before Mary died, a codicil was written by Aaron Fogg to this will. He went to the testatrix's house, at the request of the proponent, and it was there executed by Ruth W. Buzby and witnessed by him and his daughter, who went with him for that purpose. The exact form of the codicil is not given, but it was for the benefit of Mary B. Waddington, the proponent's wife, who is the daughter of Beulah Gaskill, and granddaughter of Ruth W. Buzby. She was taken by the testatrix when an infant, named after her daughter Mary, brought up by them with care and affection, and remained with them until her marriage. By the will in controversy \$1,500 is given to Beulah Gaskill, and some furniture; \$100 to Ann B. Gaskill, and some silver-ware; \$100 to Isabella P. Gaskill, and some silver-ware; \$600 to Asher B. Waddington, her great-grandson; \$600 to Martha Hancock, in lieu of any charge for services or otherwise she might make against her estate; and the residue to Mary B. Waddington, her granddaughter. Her reason for giving no legacy to her grandson Nathan W. Buzby, the caveator, is stated in her will in these words: "My grandson Nathan W. Buzby heired a legacy for one thousand dollars by the will of his grandfather, Asher Buzby. By the failure of my co-executor, George W. Ward, I have been compelled to pay the greater part of said legacy out of my own resources, and this is the reason my said grandson Nathan W. Buzby is not mentioned as a legatee in this instrument." This payment was demanded of her by her grandson when it was said that she had but \$10 left in the house for their present support; and there is evidence that, although she was patient at the time, and afterwards treated him with kindness and affection, she was displeased with his demand for the money, and his extravagance in spending it after he had received it.

Beulah Gaskill went to live with her mother after Mary's death, and remained with her until her death, with the promise that she would be provided for. She also received \$1,500 by the will of her sister, Mary. From this disposition of the property it will appear that all, excepting \$600 given to Martha Hancock for services in the family from the time she was a child, was bequeathed to Beulah Gaskill and her children; Mary B. Waddington and her

son, Asher, namesake of his grandfather, receiving the greater portion of the estate. The exclusion of Nathan W. Buzby was in the former will drawn by Aaron Fogg, with which Waddington had no connection, and Beulah Gaskill's individual portion was largely increased after the death of her sister, Mary, by her will and by the terms of this will, though in these proceedings she is hostile to the proponent. These dispositions appear more like the natural operation of the mind and affection of the testatrix than results of the fraudulent contrivance or undue influence of Waddington, who wrote this will. His conduct, his character, and relationship to her do not warrant such charges against him without more direct and certain evidence. Until about the time of Mary's death it does not appear that he took any interest in her business. He lived at Elsinboro, two and a half miles from the testatrix's home in Salem. After Mary's death, he attended to her money matters, collected her interest, and deposited it for her, advised the investment of her money when the security was changed, and with her consent reinvested it for the best rate of interest she could obtain. He was the husband of her granddaughter, and ap-

parently the nearest connection with whom she could advise, and on whose judgment she could rely, as the infirmities of age increased. While it would have been more delicate and prudent for him, under the circumstances, to secure the services of a stranger to prepare a will for the testatrix, yet, if she had sufficient capacity to make it, and this is the voluntary expression of her wishes in disposing of her property, his mistake or even officiousness in tendering his services should not be allowed to defeat her purpose, long entertained and expressed in a former will, to exclude the caveator from any portion in her property. The decree should be reversed, and the will admitted to probate.

Under the peculiar circumstances of this case the caveator will be allowed \$250 in lieu of costs, expenses, and allowances in all courts; and the executor will be given his costs and expenses out of the estate. Decree reversed.

KNAPP and PATERSON, JJ., for affirmance. The CHIEF JUSTICE, DEPUE, DIXON, GARRISON, SCUDDER, VAN SYCKEL, BROWN, CLEMENT, COLE, and MCGREGOR, for reversal.

(See, also, *White v. Starr*, [N. J. Prerog. Ct.] 20 Atl. Rep. 875; *Horn v. Pullman*, 72 N. Y. 269; *Van Alst v. Hunter*, 5 Johns. Ch. 148; *Edge v. Edge*, 38 N. J. Eq. 211; *Wilson v. Mitchell*, 101 Pa. St. 495; *Delafield v. Parish*, 25 N. Y. 9; *Campbell v. Campbell*, 130 Ill. 466, 22 N. E. Rep. 620; *Bundy v. McKnight*, 48 Ind. 502; *Kerr v. Lunsford*, 31 W. Va. 659, 8 S. E. Rep. 493.)

(45 N. J. Eq. 726, 17 Atl. Rep. 826.)

MIDDLEDITCH *et al.* v. WILLIAMS *et al.*

(*Prerogative Court of New Jersey*. June 17, 1889.)

1. UNNATURAL AND UNJUST TESTAMENTARY DISPOSITION.

A will may be contrary to the principles of justice and humanity,—it may be both unnatural and unjust,—yet, if it appears to have been made by a person of sufficient age to be competent to make a will, and also appears to be the free expression of a sound mind, it will be upheld.

2. TESTAMENTARY CAPACITY.—INSANE DELUSIONS.

If a testator possesses sufficient mental power to take into account all the considerations necessary to the making of a proper will, though he is subject to an insane delusion, yet if it appears that such delusion neither influenced him, nor was calculated to influence him, in making his will, the will must be upheld.

3. SAME.

An insane delusion is a belief in the existence of something which no rational person would, in the absence of evidence, believe to exist, and which springs up spontaneously in the mind, and is not the result of extrinsic evidence of any kind.

4. SAME.

Where a testator is induced by evidence of some kind, though it may be false, weak, or insufficient, to believe in the existence of something which in reality has no existence, his belief may show want of discernment, that he is overcredulous and easily duped, or that he lacks power to weigh evidence, or to discriminate between what is true and what is false, but it does not show that his mind is unsound.

5. SAME.—BELIEF IN SPIRITUALISM.

A belief in spiritualism, being a conviction founded upon extrinsic evidence, is not an insane delusion.

6. EVIDENCE.—DECLARATIONS OF TESTATOR.

The declarations of a testator are competent to

show the condition of his mind, but not to prove undue influence.

7. SAME.—SUSPICION OF FRAUD.

Circumstances raising a strong suspicion, but not producing conviction, that testator was duped in his belief as to spiritual manifestations from his deceased wife, which led him to bestow his bounty upon his mother-in-law and brother-in-law in disregard of a natural affection for his daughter, an only child, will not justify the court in denying probate of the will.

Appeal from orphans' court, Essex county; KIRKPATRICK, BUTTNER, and LEDWITH, Judges.

Francis E. Marsh, for appellants. *J. Frank Fort*, for respondents.

VAN FLEET, Vice-Ordinary. The question presented by the appeal in this case is whether a decree made by the orphans' court of Essex county, on the 4th day of June, 1888, admitting to probate a paper purporting to be the last will of William H. Livingston, deceased, is such a decree as the court should, in view of the facts of the case and the law applicable to them, have made. The paper in question was executed on the 11th day of January, 1887, in the city of New York, where the testator then resided. It appears to have been executed in strict conformity to the requirements of our statute regulating the execution of wills. After the execution of the paper in question, Mr. Livingston removed to the city of Newark, in this state, where he died, on the 4th day of February, 1888. His wife died in August, 1886, and after that date, up to the time of his own death, his

family consisted of himself, his daughter, Lillian, (his only surviving child,) and his mother-in-law, Marie C. Williams. His daughter, at the time of her mother's death, was five or six years of age. The testator, by the paper in question, gives all his property, of every kind and description, to his mother-in-law, and at her death to her son, William P. Williams, in trust for his daughter, to be held until his daughter has attained the age of 25 years, when, in the language of the will, "said property shall be handed over intact to her: provided, however, that in consideration of taking care of Lillian till twenty-five years of age, or until her marriage, said Marie C. Williams shall be supported and maintained, in her ordinary manner of living, out of the income derived from said property; and should Marie C. Williams be living when Lillian shall arrive at twenty-five years of age, then Lillian shall give unto Marie C. Williams a satisfactory bond or guaranty for securing to Marie means for her support during the balance of her life. Should my daughter, Lillian, die before Marie C. Williams, then my property shall belong to the latter; and should both Lillian and Marie die before William P. Williams, then my property shall belong to the last named, William P. Williams." Mrs. Williams and William P. Williams are appointed executors. It is not shown who drew this paper, nor where, nor under what circumstances, it was drawn. One of the subscribing witnesses says that he thinks the testator wrote it himself. That is the only information we have respecting its preparation or origin.

The validity of this paper, as the will of William H. Livingston, is contested on two grounds: *First*, it is said that it is shown to be the product of an insane mind; and, *second*, that it is shown to be the result of the exercise of undue influence. And it is claimed that the contents of the paper itself furnish strong evidence of the truth of both these objections. A will may be contrary to the principles of justice and humanity,—its provisions may be shockingly unnatural and extremely unjust; nevertheless, if it appears to have been made by a person of sufficient age to be competent to make a will, and also to be the free and unconstrained product of a sound mind, the courts are bound to uphold it. The courts must so treat papers of this kind, in order to maintain that great principle which confers upon every citizen, of full age and sound mind, the right to do with his own as he pleases, so long as he does not attempt to apply his property to an immoral or unlawful purpose. But in cases where want of testamentary capacity or undue influence is alleged, it is the duty of the court to scan the provisions of the will to see whether or not they furnish any evidence of the truth of the charges made against its validity.

The feature of the paper under consideration which is most likely to attract attention, as tending to show that the disposition which the testator made of the property is both unnatural and unjust, is the fact that he has, either inconsiderately

or designedly, manifested an unnatural preference for his mother-in-law and brother-in-law over the issue of his daughter. On scanning the will, it will be observed that it contains no indication whatever that the testator intended, in case his daughter should have issue, but did not survive her grandmother and her uncle, that her issue should take his property. On the contrary, if the will be read according to its plain words, it would seem to be entirely clear that he intended, if his daughter died in the life-time of either her grandmother or her uncle, that his property should go, even if his daughter left issue, not to her issue, but first to her grandmother, if she was then living, but, if not living, then to her uncle. Such I understand to be the plain direction of the will. It says: "Should my daughter Lillian die before Marie C. Williams; then my property shall belong to the latter; and, should both Lillian and Marie die before William P. Williams, then my property shall belong to the last named, William P. Williams." Death is here spoken of generally, and without restriction as to time. The testator does not say, "If my daughter Lillian shall die, without leaving lawful issue surviving her, before attaining twenty-five years of age, then my property shall go either to her grandmother or her uncle;" but what he says is, if Lillian shall die before her grandmother or before her uncle, then his property shall go to her grandmother, if living, but, if not, then to her uncle. Lillian's issue is not mentioned, nor is any provision made for it, either expressly or constructively, though the possibility that she might have issue before attaining 25 is a thing which, it would seem, must have been before the testator's mind; for in making provision for her care he limits the period that her grandmother shall take care of her to the time when she attains 25, or until her marriage. But suppose we say that, according to the settled rule of construction in such cases, the true meaning of the will is that neither the grandmother nor the uncle will take unless Lillian shall die before attaining 25 years of age,—and that, I think, is the construction which should be adopted,—still it is apparent that under this view the will is not such a one as a father, having an only child, and in the full possession of his senses, and with the instincts and affections common to our nature, would, when entirely free from any sinister influence, have been likely to make; for under this view it will be seen that if Lillian marries, has issue, and dies before attaining 25, her grandmother or her uncle will take the property given by the will to the exclusion of her issue. The will in this respect is, in my judgment, both unnatural and unjust.

But this, standing alone, constitutes no reason why the paper should not be given effect as the will of the testator. It may help to show that the testator lacked testamentary capacity, or that his will is not the free expression of his mind and heart, but in a case where it appears that he had the requisite capacity, and that his will is the unfettered expression of his wishes, it amounts to nothing at all. The

paper in question is, however, assailed on other grounds. It is charged that it is the direct product of an insane delusion. The testator was a believer in spiritualism; that is, he believed the spirits of the dead can communicate with the living, through the agency of persons called "mediums," and who possess qualities or gifts not possessed by mankind in general. The proofs show that the testator stated to several persons, prior to the execution of his will, that the spirit of his dead wife had requested him, through a medium residing in Forty-Sixth street, in the city of New York, to make provision for his mother-in-law in his will. To one person he said that his wife's spirit had requested him to give all his property to her mother, and to do it in such a way that none of his relatives could get it away from her. To the same person he said, at another time, that the spirit of his wife was constantly urging him to make a will in favor of her mother. To another person he said that the spirit of his wife had requested him to be good to her mother, and see that she was made comfortable during the remainder of her life, and he also said that he intended to make a will, leaving enough to his mother-in-law to make her comfortable, because his wife wanted him to do so. The testator's wife, by her will, gave all her property to the testator, subject, however, to an annual payment of \$500 to her mother, and the like sum to her brother, William P. Williams, during their joint lives, and, after the death of either, then to the payment of \$1,000 annually to the survivor during his or her life. The evidence shows, I think, beyond doubt, that the testator believed, fully and thoroughly, that the messages which were delivered to him, as communications from his wife, actually came from her spirit, and that her spirit knew constantly all that he was doing.

The important question which this branch of the case presents for decision is, was such belief an insane delusion? The prevailing doctrine in England, up to the time the court of queen's bench decided *Banks v. Goodfellow*, L. R. 5 Q. B. 549, was that any degree of mental unsoundness, however slight, and even if it exercised no influence over the testator in making his will, and was wholly unconnected with the disposition he had made of his property, would, nevertheless, be fatal to the validity of his will. The course of reasoning which led to the adoption of this doctrine is stated as follows by Cockburn, C. J., in *Banks v. Goodfellow*, (page, 559:) "To constitute testamentary capacity, soundness of mind is indispensably necessary. But the mind, though it has various faculties, is one and indivisible. If it is disordered in any one of these faculties, if it labors under any delusion arising from such disorder, though its other faculties and functions may remain undisturbed, it cannot be said to be sound. Such a mind is unsound, and testamentary incapacity is the necessary consequence." A different doctrine was established by *Banks v. Goodfellow*. It was there held that if a testator possesses sufficient mental power to take into account all the

considerations necessary to the proper making of a will, though he is subject to some delusion, yet if it appears that such delusion did not influence him, and was not calculated to influence him, in making his will, his will is entitled to be regarded as a valid testamentary act, and should be upheld. The principle established by that case is expressed in the following sentence of Chief Justice Cockburn's opinion: "If it be conceded, as we think it must be, that the only legitimate or rational ground for denying testamentary capacity to persons of unsound mind is the inability to take into account and give due effect to the considerations which ought to be present to the mind of a testator in making his will, and to influence his decision as to the disposal of his property, it follows that a degree or form of unsoundness which neither disturbs the exercise of the faculties necessary for such an act, nor is capable of influencing the result, ought not to take away the power of making a will, or place a person so circumstanced in a less advantageous position than others with regard to this right." All subsequent cases arising in England have been decided according to this principle, and it is now the established law of that country. *Boughton v. Knight*, L. R. 3 Prob. & Div. 64; *Jenkins v. Morris*, 14 Ch. Div. 674; *Smee v. Smee*, 5 Prob. Div. 84. The same principle has, in its substance, been recognized by the court of errors and appeals of this state. Chief Justice BEASLEY, in pronouncing the judgment of that court in *Lozeau v. Shields*, 23 N. J. Eq. 509, declared that partial insanity was insufficient of itself to justify a decree setting aside a sale of real property or any other act. He said: "Mania does not, *per se*, vitiate any transaction; for the question is whether such transaction has been affected by it. Where a pure defense of mental incapacity is interposed, I think the true test in this class of cases is whether the party had the ability to comprehend, in a reasonable manner, the nature of the affair in which he participated. This is the rule, in the absence of fraud; for fraud, when present, introduces other principles of decision." My own view as to the true rule on this subject may be stated as follows: Even if it appears that a testator was subject to an insane delusion when he made his will, but it is also made to appear that his delusion was not of a character likely to influence him, and did not influence him, in the disposition which he made of his property, his will should be declared valid.

But this is somewhat aside from the question mainly in contest on this branch of the case, namely, is a belief in spiritualism an insane delusion? Sir JOHN NICHOLL, in the celebrated case of *Dew v. Clark*, 3 Addams, Ecc. 79, (2 Eng. Ecc. R. 441.) defined "insane delusion" as follows: "Whenever the patient once conceives something extravagant to exist, which has still no existence whatever but in his own heated imagination, and wherever, at the same time, having once so conceived, he is incapable of being, or at least of being permanently, reasoned out of that conception, such a patient is said to be under a delu-

sion, in a peculiar, half-technical sense of the term, and the absence or presence of delusion, so understood, forms, in my judgment, the true and only test or criterion of present or absent insanity." Dr. Haggard's report of the opinion pronounced in *Dew v. Clark* attributes somewhat different language to Sir JOHN NICHOLL. The following is the definition, as he reports it: "When persons believe things to exist which exist only, or at least in that degree exist only, in their own imagination, and of the non-existence of which neither argument nor proof can convince them, they are of unsound mind; or, as one of the counsel accurately expressed it, 'it is only the belief of facts which no rational person would have believed, that is insane delusion.'" 1 Williams, Ex'rs, 35; 1 Redf. Wills, 71. Sir JAMES HANNEN, in *Boughton v. Knight*, L. R. 3 Prob. & Div. 64-68, adopted the definition as reported in 3 Addams as the true one. He said he believed it would solve most, if not all, the difficulties which could arise in investigations of the kind now under consideration. Chief Judge DENIO, in *Society v. Hopper*, 33 N. Y. 619-624, said: "If a person persistently believes supposed facts, which have no real existence except in his perverted imagination, and against all evidence and probability, and conducts himself, however logically, upon the assumption of their existence, he is, so far as they are concerned, under a morbid delusion; and delusion, in that sense, is insanity." And COCKBURN, C. J., in *Banks v. Goodfellow*, (page 560,) says: "When delusions exist which have no foundation in reality, and spring only from a diseased and morbid condition of the mind, to that extent the mind must necessarily be taken to be unsound."

According to these definitions, it is only a delusion or conception which springs up spontaneously in the mind of a testator, and is not the result of extrinsic evidence of any kind that can be regarded as furnishing evidence that his mind is diseased or unsound; in other words, that he is subject to an insane delusion. If, without evidence of any kind, he imagines or conceives something to exist which does not in fact exist, and which no rational person would, in the absence of evidence, believe to exist, then it is manifest that the only way in which his irrational belief can be accounted for is that it is the product of mental disorder. Delusions of this kind can be accounted for upon no reasonable theory, except that they are the creations of some derangement of the mind in which they originate. To illustrate: In *Smee v. Smee*, 5 Prob. Div. 84, the testator imagined himself to be the son of George IV., and that when he was born a large sum of money had been put in his father's hands for him, but which his father, in fraud of his rights, had distributed to his brothers; and in *Smith v. Tebbitt*, L. R. 1 Prob. & Div. 398, the testatrix imagined herself to be one of the persons of the Trinity, and her chief legatee to be another. The delusion, in both instances, as will be noticed, was indisputably a wild and baseless fancy, not the product of evidence of any kind,

but obviously the offspring of a disordered condition of mind. But where a testator is induced, by false evidence or false statements, to believe a fact to exist which does not exist, or where, in consequence of his faith in evidence which is true, but which is wholly insufficient to prove the truth of what he believes, he believes a fact to exist which in reality has no existence, his belief may show want of discernment, that he is overcredulous and easily duped, or that he lacks power to analyze and weigh evidence, or to discriminate between what is true and what is false, but it furnishes no evidence whatever that his mind is diseased. His belief may show lack of judgment or want of reasoning power, but not that his mind is unsound.

The testator's belief in spiritualism was not a morbid fancy, rising spontaneously in his mind, but a conviction produced by evidence. The proofs show that when he first commenced attending what are called "séances" he was inclined to be skeptical. Afterwards his mind seemed to be in an unstable condition,—he sometimes believed and at others doubted; and that it was not until the spirits gave an extraordinary exhibition of their power, by printing or painting on a pin, worn by his mother-in-law on her neck, in brilliant letters, which sparkled like diamonds, the word "Dickie," a pet name of his dead wife, that his last doubts as to the reality of the manifestations were removed. Believing, as I do, that these manifestations were correctly described by Vice-Chancellor GIFFARD, in *Lyon v. Home*, L. R. 6 Eq. 655-681, when he called them "mischievous nonsense, well calculated, on the one hand, to delude the vain, the weak, the foolish, and the superstitious, and, on the other, to assist the projects of the needy and of the adventurer," still it seems to me to be entirely clear that it cannot be said that a person who does believe in their reality is, because of such belief, of unsound mind, or subject to an insane delusion. No court has as yet so held. No cases on this subject were cited on the argument. Those which I have examined uniformly hold that a belief in spiritualism is not insanity. The court in *Robinson v. Adams*, 62 Me. 369, said: "Belief in spiritualism is not insanity, nor an insane delusion." * * * The term 'delusion,' as applied to insanity, is not a mere mistake of fact, or the being misled by false testimony or statements to believe that a fact exists which does not exist." And in *Brown v. Ward*, 53 Md. 376, it was said: "The court cannot say, as matter of law, that a person is insane because he holds the belief that he can communicate with spirits, (of the dead,) and can be and is advised and directed by them in his business transactions and in the disposal of his property." Substantially the same view was expressed in *Otto v. Doty*, 61 Iowa, 23, 15 N. W. Rep. 578, and also in the matter of *Smith's Will*, 52 Wis. 543, 3 N. W. Rep. 616, and 9 N. W. Rep. 665. The utmost length to which any court has as yet gone on this subject is to declare that a belief in spiritualism may justify the setting aside of a will when it is shown that the testator,

through fear, dread, or reverence of the spirit with which he believed himself to be in communication, allowed his will and judgment to be overpowered, and in disposing of his property followed implicitly the directions which he believed the spirit gave him; but in such case the will is set aside, not on the ground of insanity, but of undue influence. *Thompson v. Hawks*, 14 Fed. Rep. 902.

There is no evidence in this case which will support a conclusion that the testator, at the time he executed his will, was subject to an insane delusion. Nor do I think there is any evidence in the case which will support a judgment declaring that the will in question is the result of undue influence. There is no proof tending to show what influence the spirits or the medium exercised over the testator in making his will, except that which proceeded from the testator's own mouth. His declarations are competent to show the condition of his mind, but not to prove undue influence against either persons or spirits. *Rusling v. Rusling*, 36 N. J. Eq. 603-607. For the purpose of proving undue influence, they are without the least force. Neither the medium, nor Mrs. Williams, (the mother-in-law,) nor any other person who was present at any of the *séances*, has been examined as a witness. No legal evidence of what occurred at any of them is before the court. The charge of undue influence is mainly directed against Mrs. Williams. She is said to be a believer in spiritualism, and the proofs show that she went with the testator frequently when he went to the medium to consult the spirit of his dead wife. There are some things in her conduct which are calculated to create strong suspicion. Without apparent cause she seems to have entertained feelings of strong dislike towards all the testator's relatives. On the day of his wife's funeral she ordered his sister out of the house, without cause or right, and in utter defiance of the proprieties of the occasion, and after his sister refused to go she put herself so near to the testator and his sister as to be able to overhear everything they said. From that time forward, up to the time of testator's death, Mrs. Williams continued to

reside with him, and his sister never, after the funeral, went to his house, nor, so far as appears, did any of his other relatives. When the testator died Mrs. Williams not only neglected to send notice of his death to any of his relatives, but did what she could to conceal his death from them. After the testator's death she admitted that she had persuaded or gotten him to insert the clause in his will which defers the turning over of his property to his daughter until she is 25, stating that the reason she did so was because she thought that when the daughter was of age some old fool might come after her for her money, and she wanted to protect her against such persons; and it also appears that she was present when the spirits gave the testator such evidence of their presence as he regarded conclusive, by printing on a pin on her neck, in brilliant letters, the pet name of his wife. These things naturally breed suspicions and create fears. They show that it is possible that every message the testator received, purporting to come from the spirit of his dead wife, came, not from the dead, but from the living, and that everything that was done to dispel the testator's doubts, and to induce him to believe in the reality of the spiritual manifestations which he witnessed, was, from beginning to end, a pre-arranged scheme of deception and fraud. But there is no proof in the case which will support a judgment that such was the fact. There is enough to raise a strong suspicion, but not enough to produce conviction. Undue influence, like fraud, cannot, in a case where no relation of trust exists, be presumed, but must be proved. I strongly suspect that the testator was duped. It may also be true that he was unduly influenced. I believe that the examination of Mrs. Williams, or the medium, as a witness, would, in all probability, have made many things which now seem dark and obscure, plain and clear. The question, however, whether or not the paper in question is the will of the testator, must be decided by the evidence before the court. Taking that as the sole guide to the judgment to be pronounced, I think it is the duty of the court to affirm the decree made below.

(See, also, *Coit v. Patchen*, 77 N. Y. 533; *In re White's Will*, 121 N. Y. 406, 24 N. E. Rep. 935; *Benoist v. Murrin*, 58 Mo. 307; *Banks v. Goodfellow*, L. R. 5 Q. B. 549; *Boardman v. Woodman*, 47 N. H. 120; *Clapp v. Fullerton*, 34 N. Y. 190; *Whitney v. Twombly*, 136 Mass. 145.)

(4 N. Y. Supp. 181.)

In re MACPHERSON'S WILL.

(*Surrogate's Court, New York County.* Jan. 2, 1889.)

1. TESTAMENTARY CAPACITY—INSANITY—LUCID INTERVALS.

A will made by an insane person during a lucid interval may be valid, but the facts establishing intelligent action must be shown.

2. SAME.

Before executing her will, testatrix showed symptoms of insanity, which were displayed especially by causeless outbursts of passion, but these occasions were alternated by continued periods of sanity. Her oral and subsequent written directions for the drafting of the will were rationally given, and the will was reason-

able, and accorded with her previously expressed intentions. The subscribing witnesses, one of them a law clerk, testified to her mental capacity when the will was executed. *Held*, that the will should be admitted to probate, the sanity of testatrix at its execution being sufficiently established.

The will of Sara J. MacPherson, deceased, was offered for probate by John MacPherson, father of the executrix therein named, who was an infant. Elizabeth Hammond contested it on the ground of want of testamentary capacity. The letter referred to in the opinion as having been left at the house of Judge Angell, consisted of disconnected and irrelevant expressions, wholly without meaning.

Blair & Rudd, for proponent. *James R. Angell*, for contestant.

RANSOM, S. A perusal of the testimony taken in this case must lead any mind to the conclusion that the testatrix, for a considerable period before her death, was an excitable, sickly woman, who, on slight provocation, and often with no apparent cause, flew into fits of passion, and displayed many symptoms of a diseased mind. Conversation upon topics connected with certain of her relatives invariably excited her to some outburst. No person in the enjoyment of her senses would have composed the letter which appears to have been left at the house of Judge Angell by the deceased. Nevertheless, the unanimous testimony of the witnesses (with, possibly, the single exception of Mrs. Angell) is to the effect that, while these manifestations of an unhealthy mind were chronic from the date of her first illness, she was sometimes, for continued periods of time, in the possession of her faculties. In the light of these facts, the law as laid down in the case of *Gombault v. Public Administrator*, 4 Bradf. Sur. 226, might be taken as the text upon which to write a decision of this cause, viz.: "A will made in a lucid interval may be valid, but the facts establishing intelligent action must be shown. The nature and character of the instrument, and of its dispositions, have great influence, * * * and it is important to ascertain whether the contents of the will harmonize with the state of the decedent's affections and intentions otherwise expressed." In the case at bar the subscrib-

ing witnesses prove the due execution of the will, and that at the time the testatrix had mental capacity to make a will. One of the subscribing witnesses was a law clerk, and presumably familiar with the legal requisites. The will was drawn by Mr. Rudd, after an interview with testatrix, who called at his office for the purpose of giving instructions therefor. Thereafter he received a note from testatrix, containing substantially similar directions, and the will was drawn accordingly, and sent to her by a messenger, who superintended its execution at the house of decedent. At this interview with Mr. Rudd he testifies that she conversed rationally upon the subjects introduced. That the will is in accord with her expressed intentions appears by the testimony of her brother, as well as by the evidence of Mr. Rudd. In the case of *Chambers v. Queen's Proctor*, 7 Eng. Ecc. R. 164, cited in *Gombault v. Public Administrator*, supra, the decedent died by his own hand the day after he executed the will. There had been indications of insanity immediately before and after its execution. The court said: "If done during a lucid interval, the act will be valid, notwithstanding previous and subsequent insanity,"—and the will was upheld mainly on the ground of the reasonable dispositions contained in the instrument, the absence of proof of delusion at the time of the *factum*, and the rational manner in which the act was performed. Every incident specified in that case is supplied here for the purpose of supporting the will, and I am of opinion that the will should be admitted to probate.

(See, also, *Cartwright v. Cartwright*, 1 Phillim. Ecc. 90; *Waring v. Waring*, 6 Moore, P. C. 341; *Gombault v. Public Administrator*, 4 Bradf. Sur. 226; in re *Gangwere's Estate*, 14 Pa. St. 417.)

(45 N. J. Eq. 702, 17 Atl. Rep. 692.)

BANNISTER et al. v. JACKSON.

(*Prerogative Court of New Jersey*, May 24, 1889.)

1. TESTAMENTARY CAPACITY—INTOXICATION.

The test of testamentary capacity is that the testator can comprehend the property that he is about to dispose of, the objects of his bounty, the meaning of the business in which he is engaged, the relation of each of these factors to the others, and the distribution that is made by the will. The effect of present intoxication and mental disease, induced by habitual indulgence in intoxicants, must be measured by such test, for both may exist in some degree without destroying testamentary capacity.

2. SAME.

Testator bequeathed \$500 to his wife, and the same sum to his daughter, and the balance of the estate, valued at \$15,000, was divided among his brothers. He was addicted to the excessive use of intoxicating liquors, which had impaired, to some extent, both his mental and physical powers. But while at times he seemed to be afflicted with dullness and loss of memory, at other times he exhibited a keen, shrewd capacity for business, and a strong will. About the time of making the will he sold out his business to good advantage, and afterwards was identified with business enterprises, being elected director of a building association. The will provided that the money left to the daughter should be free from the control of her husband, although the latter was dead at the time of making the will; but this was in part explained by his separation from his wife

and daughter, and by the fact that the daughter had separated from her husband. When the will was executed the testimony showed that he had been drinking a little, but not to such an extent as to disorder his faculties or pervert his judgment. *Held*, that lack of testamentary capacity was not shown.

Appeal from orphans' court, Essex county; *KIRKPATRICK, BUTNER, and LEDWITH, Judges.*

Proceedings for the probate of the will of George M. Bannister, offered by John Jackson, executor, named therein, contested by Caroline F. Bannister and Caroline J. Marsh, heirs at law. The orphans' court admitted the will to probate, and contestants appealed.

C. W. Riker, for appellants. *M. T. Barrett and Henry Young*, for respondent.

McGILL, Ordinary. This appeal is from a decree of the orphans' court of Essex county, which directs that a paper purporting to be the last will and testament of George M. Bannister be admitted to probate. The paper was executed in accordance with the requirements of the statute, on the 24th of April, 1884, and on the 22d day of March, 1887, the testator died of chronic alcoholism at the German hospital, in the city of Newark. The ap-

pellants are his widow and only child. By the disputed paper, \$500 is bequeathed to the widow, and declared to be in addition to her dower right, and \$500 is given to the daughter, Caroline J. Marsh, who was then a widow, and provision is made that that sum shall be her own property, free from the control of her husband, Edward Marsh. The residue of the estate is divided equally between the four brothers of the testator, who reside in England, with the proviso that, in case two of the brothers, who are named, should die before the testator, without leaving issue, then their share shall be divided equally between the surviving brothers or their heirs. John Jackson, a friend and former business agent of Mr. Bannister, is named as the executor of the will, and power is given him to sell real estate. The estate disposed of is valued at from \$12,000 to \$15,000, and consists entirely of personal property. When the will was made the testator and Mr. Jackson were the equitable owners of a farm at Brookdale, in this state, the legal title to which was in the name of one McCartney, who held it in trust for him, and the testator alone was the equitable owner of a house and lot in the city of Newark, the legal title to which was then held in trust for him by Mr. Jackson. The admission of the will to probate is resisted upon the ground that at the time of its execution Bannister did not possess testamentary capacity. It is insisted that he had become an habitual drunkard, was afflicted with chronic alcoholism, and at the very moment of the paper's execution was so far intoxicated that he did not comprehend the act in which he was engaged. Bannister was married to the appellant Caroline F. Bannister, in 1855. She had been married before, but was then a widow. By her he had a daughter, the appellant Caroline J. Marsh. Until 1875 he was a prosperous slipper manufacturer in Newark. In that year he commenced to use intoxicating liquors to excess, and a year later left his wife and daughter, to live with a woman of disreputable character, and from that time until his death he continued in excessive indulgence in intoxicating drink. Witnesses describe the quantity of liquor that he consumed as "enormous." When sober he was nervous, sleepless, and irritable. His hand trembled continuously. He spoke of seeing strange figures and imps, and otherwise exhibited characteristics of the habitual inebriate. Yet, notwithstanding his condition, he managed to keep his business together, and, at about the time of making the paper in question, to sell it at considerable advantage. Sometimes he appeared to be afflicted with dullness and loss of memory, and at other times he exhibited a keen, shrewd capacity for business, and a strong will. In the spring of 1884 he declared that he had determined to go to Europe for the benefit of his health, and then made the advantageous sale of his business above spoken of, and at about the same time transferred to his mistress, in settlement of all her claims upon him, the furniture of the house in which they had lived together. He then made the

will in dispute, and then, for the benefit of his health, went for two weeks to his Brookdale farm, and then to England. During all the time that he was separated from his wife and daughter, except while he was in England, he contributed to their support, remitting to them weekly a certain allowance. While he was in England his daughter wrote to him for assistance, and he answered her by the following letter, which should be inserted here because of its value in ascertaining his condition of mind and capacity at the time he wrote it: "London, July 12th, 1884. Carrie: Your letter just received. Glad to hear that all is well. You will please to understand that I am so placed that I cannot occupy but one home. I have for over nine years gave you and your ma a good living. Now there is a change. If your mother wants me, I will make arrangements to come, and I will make her as happy as a man can make his loving wife. Yours, G. M. B. P. S. I have sent by mail to Mr. Jackson to carry out all arrangements that you might make. Now, to you, my D. Can you lay your head on your pillow at night, and say to your God that you have been a loving, faithful child? If you can, then your God is not mine. G. M. B." In August of the same year he returned to Newark, and immediately took up his residence with his wife and daughter, and remained with them until some time in the following December. He had not been able to break his pernicious habits, and while he thus lived with them he was seldom sober. In December he returned to his mistress, and resided with her until he died, in the spring of 1887. For some years before he went to England he had been the vice-president and a director of the Mutual Building & Loan Association of Newark. When he went to England he resigned those offices, but upon his return from England was re-elected a director of the corporation. The president of that association says that he was valued as a man of excellent judgment, and was frequently selected to act upon committees to audit accounts and appraise the value of property upon which loans were to be placed. He was not thought by this witness to be incompetent to transact business until a month or two before his death. After his return he was employed by Thomas Phaup, a slipper manufacturer, as the manager and foreman of his business, and for fifteen months was paid \$15 a week in that capacity. During this employment he loaned Phaup \$1,000, taking security for the loan, and so managed that he ultimately became the owner of Phaup's business. Up to the time of his death he kept a bank account in his own name. His money was chiefly invested in mortgages placed by himself, the interest from which he or his friend Jackson collected. While he was in England Jackson managed his affairs, and rendered him regular accounts. His securities were always kept in Jackson's safe.

The proofs satisfy me that at the time the will was made Bannister had become addicted to the excessive use of intoxicat-

ing liquors, and that to some extent such indulgence had impaired both his mental and physical powers, and had probably contributed to the degradation of his moral character, but at the same time I am satisfied that the impairment of his mental faculties did not extend so far as to render him incompetent to perform a legal act when he was not under the immediate influence of intoxication. The test of testamentary capacity in this state is that the testator can comprehend the property he is about to dispose of, the objects of his bounty, the meaning of the business in which he is engaged, the relation of each of these factors to the others, and the distribution that is made by the will. The capacity required is moderate, and, though the testator be subject to many infirmities, though he be feeble, absent-minded, forgetful, aged, diseased, blind, or otherwise infirm, if he yet possess the powers required by this test, he will be held to have testamentary capacity. *Waddington v. Buzby*, 43 N. J. Eq. 154, 10 Atl. Rep. 862. I am entirely satisfied that Mr. Bannister had testamentary capacity when he made the document in dispute. Much stress was laid by the counsel for the appellant upon the fact that the will provided that the money which was left to the testator's daughter was to be free from the control of her husband, when in fact, at the time the will was made, that husband had been dead two years. The daughter's marriage, her separation from her husband, the husband's death, and the making of the will, all occurred while Bannister lived apart from his wife and daughter. The testimony that he had been informed of the death of his son-in-law comes from the daughter alone. Possibly she may be mistaken as to her statement of it, or possibly it may have been conveyed to him at a time when he was under the influence of strong drink, and incapable of appreciating or remembering the information. His separation from his wife and daughter, and the daughter's separation from her husband, created a situation of affairs in which the death of the son-in-law would fail to disturb existing relations, so as to emphasize it and impress it upon his memory. I cannot but believe that the testator's failure to remember the death when he made his will must be attributed to other causes than disease of mind or incapacitating failure of memory.

The remaining inquiry is whether at the very time of the making of the will the testator was under the influence of liquor. The three persons present at the execution of that paper have been sworn. John Otto, the justice of the peace and conveyancer who drew the will, was not directly questioned upon the subject, but he says that Bannister came to his office at about 10 o'clock in the morning, and told him

that he was going to Europe, and that he desired to arrange his affairs before he left, and then gave Otto directions for the will, and, as Otto says, the ideas to put in it. Otto then told him that he must have another witness, and he went out, saying that he would get Frank J. Merz. Mr. Merz was a saloon-keeper near by. He says that Bannister came in his saloon at about 11 o'clock in the morning, and called him aside, and asked him if he would be a witness to his will, and that he (Merz) assented, and went with him. He further says that Bannister was a little excited, and that he (the witness) thought that he had been drinking a little, for he smelt the liquor upon him, and Bannister seemed to be nervous. John Jackson, who was also present at the execution of the will, states that Bannister either came to him or met him that morning, and requested him to accompany him (Bannister) to Mr. Otto's office, where he proposed to have his will drawn. He told Jackson that he was going to Europe, and that he wished Jackson to be the executor of the will. Jackson says that the testator was sober, and knew what he was doing. When the will was completed Mr. Otto read it, and after it had been executed Bannister paid Otto for drawing it, and handed the will to Jackson. It may be that Bannister had been drinking immediately before his will. Merz says that he had been drinking a little,—was a little excited; to use his expression, was "kind o' nervous,"—but he does not pretend to say that Bannister did not appreciate the business in which he was engaged. To Jackson he seemed to be sober, and that which he did and said throughout the transaction seems to clearly indicate that he was not intoxicated; at all events, to such a degree as to disorder his faculties or pervert his judgment. In *Peck v. Cary*, 27 N. Y. 9, 23, Chief Justice DENIO said: "It is not the law that a dissipated man cannot make a contract or execute a will, nor that one who is in the habit of excessive indulgence in strong drink must be wholly free from its influence when performing such acts. If fixed mental disease has supervened upon intemperate habits, the man is incompetent and irresponsible for his acts. * * * If he is so excited by present intoxication as not to be master of himself, his legal acts are void, though he may be responsible for his crimes." My conclusion, after a careful examination of this case, is that at the time the will in dispute was made Mr. Bannister's habitually excessive indulgence in strong drink had not produced a fixed mental disease sufficient to destroy his testamentary capacity, and that at the very moment of the execution of that document he was not so intoxicated that the act in which he was engaged was vitiated. I will therefore affirm the decree of the orphans' court.

(See, also, *Lee's Case*, 46 N. J. Eq. 193, 18 Atl. Rep. 525; *Harmony Lodge's Appeal*, 127 Pa. St. 269, 18 Atl. Rep. 10; *Pierce v. Pierce*, 38 Mich. 412; *Lewis v. Jones*, 50 Barb. 645; *Peck v. Cary*, 27 N. Y. 9.)

II. UNDUE INFLUENCE.

(63 N. Y. 504.)

ROLLWAGEN V. ROLLWAGEN *et al.*

(Court of Appeals of New York. Jan. 18, 1876.)

1. UNDUE INFLUENCE IN PROCURING WILL—WHAT CONSTITUTES.

To make the influence exercised over a testator undue and illegal, it must be such as to destroy his free agency; it is immaterial how little the influence may be, if free agency is thereby destroyed.

2. SAME—EVIDENCE.

Undue influence may be shown by all the facts and circumstances surrounding testator, the nature of the will, his family relations, the condition of his health and mind, his dependency upon and subjection to the control of the person supposed to have wielded the influence, the opportunity and disposition to wield it, and the acts and declarations of such person. It is not sufficient to avoid a will that it results from the legitimate influence which affection or gratitude gives a relative over the testator. But if one take advantage of the affection or gratitude of another, to obtain an unjust will in his favor, using his influence to control and subdue the mind of the testator, so as substantially to deprive him of free agency, then the fact that affection or gratitude was the moving cause makes it no less a case of undue influence.

3. SAME.

In 1871 testator, an uneducated man, who could neither read nor write, worth about \$700,000 in real estate, married a niece of his deceased wife, who for several years had been his housekeeper. At that time he was a confirmed invalid, having nearly lost the power of speech, and his infirmities increased until his death, in October, 1873. In the year 1872 it appeared from the evidence of his intimate friend that he could not speak a word, nor utter an intelligible sound. In April, 1873, he discharged his old business agent, and employed a brother of his wife, a man of no business capacity, to take charge of his property, and a large and expensive residence was purchased and furnished. In the fall of 1872, and again in June, 1873, the brother employed attorneys to draw wills for testator in favor of the wife, by which the residuary estate was tied up until his youngest grandchild should come of age, the brother being made trustee. The wife gave all the directions for making the will, claiming to understand the sounds made by testator, none of which were intelligible to the attorney, nor did testator at such time utter any word or intelligible sound. In September, 1873, a codicil was drawn under similar circumstances, increasing the gift to the wife. None of testator's children or grandchildren were present at the execution of the wills or codicil, nor did it appear that they knew of them. *Held*, that it did not appear that testator understood and assented to the provisions of the instruments, and that they were procured by undue influences.

Appeal from supreme court, general term, first department.

Instruments purporting to be the last will and testament of Frederick Rollwagen, deceased, and a codicil thereto, were, by the executors therein named, offered for probate to the surrogate of New York county, and probate was refused. On appeal to the supreme court, the decree of the surrogate was affirmed, and the proponents appealed to this court.

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who could neither read nor write, worth about \$700,000 in real estate, married a niece of his deceased wife, who for several years had been his housekeeper. At that time he was a confirmed invalid, having nearly lost the power of speech, and his infirmities increased until his death, in October, 1873. In the year 1872 it appeared from the evidence of his intimate friend that he could not speak a word nor utter an intelligible sound. In April, 1873, he discharged his old business agent, and employed a brother of his wife, a man of no business capacity, to take charge of his property, and a large and expensive residence was purchased and furnished. In the fall of 1872, and again in June, 1873, the brother employed attorneys to draw wills for testator in favor of the wife, by which the residuary estate was tied up until his youngest grandchild should come of age, the brother being made trustee. The wife gave all the directions for making the will, claiming to understand the sounds made by testator, none of which were intelligible to the attorney, nor did testator at such time utter any word or intelligible sound. In September, 1873, a codicil was drawn under similar circumstances, increasing the gift to the wife. None of testator's children or grandchildren were present at the execution of the wills or codicil, nor did it appear that they knew of them.

Wm. H. Arnoux and *Wm. A. Beach*, for appellant. *Henry L. Clinton* and *George F. Laugbein*, for respondents.

EARL, J. The decedent probably had sufficient mind to make a will, and this is not denied by contestants' counsel. His mind was, however, undoubtedly impaired and his will enfeebled by paralysis and disease; to what extent we are unable to determine. If, therefore, the only objection to the probate of this will was mental incompetency to make it, the objection could not prevail. A party who offers an instrument for probate as a will must show satisfactorily that it is the will of the alleged testator, and upon this question he has the burden of proof. If he fails to satisfy the court that the instrument speaks the language and contains the will of the testator, probate must be refused. The laws in reference to the distribution of the estates of persons dying intestate are founded upon principles of public policy and justice, and must regulate the transmission of property, unless a person before death has, in the mode prescribed by law, himself provided how his property after death shall be disposed of. As said by Judge DAVIES in *Delafield v. Parish*, 25 N. Y. 9, 35: "It is not the duty of the court to strain after probate, nor in any case to grant it, where grave doubts remain unremoved and great difficulties oppose themselves to so doing." And this was substantially

the language of Lord BROUGHAM in *Panton v. Williams*, 2 Curt. Ecc. 530. Ordinarily, when a testator subscribes and executes a will in the mode required by law, the facts of such subscription and execution are sufficient proof that the instrument speaks his language and expresses his will; but when a testator is deaf and dumb, or unable to read or write and speak, something more is demanded. There must then not only be proof of the *factum* of the will, but also that the mind of the testator accompanied the act, and that the instrument executed speaks his language, and really expresses his will. This will is somewhat complicated in its terms, and I am satisfied that there was no time in the year 1873 when the decedent could utter the words or give expression to the language therein contained. Even if, according to some of the evidence, he could at times talk some, it was only at intervals, and to a limited extent. However it may have been at other times, he could not talk or utter an intelligible sound on the days when the will and codicil were executed, and the attorney who drew the will could not hold any conversation with him, and received all his instructions from his wife. It is true that the will and codicil were read to him, and that he is claimed to have assented by the nod of his head, and the nasal sound without meaning; but it was shown that when in health he had a habit of nodding with his head when he did not mean assent, and hence that furnished no certain indication of his assent to what was read. The will disposes of a large estate in a method by no means simple and direct; and the proof that he understood and assented to its provisions should be quite clear and satisfactory before it should be admitted to probate. *Barry v. Butlin*, 1 Curt. Ecc. 639; *Chaffee v. Baptist Miss. Con.*, 10 Paige, 90; *Boyd v. Cook*, 3 Leigh, 35; *Van Pelt v. Van Pelt*, 30 Barb. 134; *Longchamp v. Fish*, 2 Bos. & P. 415.

It is said in 1 Jarm. Wills, 29, "that, in proportion as the infirmities of the testator expose him to deception, it becomes imperatively the duty, and should be anxiously the care, of all persons assisting in the testamentary transaction, to be prepared with the clearest proof that no imposition has been practiced, but that the testator did in fact fully understand every portion of the paper which he executed as his will." In *Weir v. Fitzgerald*, 2 Bradf. Sur. 42, the learned surrogate says: "Something more is necessary to establish the validity of the will, in cases where, from infirmities of the testator, his impaired capacity, or the circumstances attending the transaction, the usual inference cannot be drawn from the mere formal execution. Additional evidence is therefore required that the testator's mind accompanied the will; that he knew what he was executing, and was cognizant of the provisions of the will." Satisfactory evidence of this kind has not been produced in this case, and hence probate was properly refused.

But if we assume that the will and codicil were formally executed, and that the mind of the testator accompanied the act,

and that the contents of the instruments were known to him and assented to by him, probate would still have to be refused on account of undue influence. It is impossible to define or describe with precision and exactness what is undue influence, what the quality and the extent of the power of one mind over another must be to make it "undue" in the sense of the law, when exerted in making a will. Like the question of insanity, it is to some degree open and vague, and must be decided by the application of sound principles and good sense to the facts of each given case. *Lynch v. Clements*, 24 N. J. Eq. 431. But the influence exercised over a testator which the law regards as undue or illegal must be such as to destroy his free agency; but, no matter how little the influence, if the free agency is destroyed it vitiates the act which is the result of it. In 1 Jarm. Wills, 36, it is said "that the amount of undue influences which will be sufficient to invalidate a will must, of course, vary with the strength or weakness of the mind of the testator; and the influence which would subdue and control a mind naturally weak, or one which had become impaired by age, sickness, disease, intemperance, or any other cause, might have no effect to overcome or mislead a mind naturally strong and unimpaired." The undue influence is not often the subject of direct proof. It can be shown by all the facts and circumstances surrounding the testator, the nature of the will, his family relations, the condition of his health and mind, his dependency upon and subjection to the control of the person supposed to have wielded the influence, the opportunity and disposition of the person to wield it, and the acts and declarations of such person. *Marvin v. Marvin*, 3 Abb. Dec. 192; *Reynolds v. Root*, 62 Barb. 250; *Tyler v. Gardiner*, 35 N. Y. 559; *Forman v. Smith*, 7 Lans. 443; *Lee v. Dill*, 11 Abb. Pr. 214; *Dean v. Negley*, 41 Pa. St. 312.

It is not sufficient to avoid a will that it is obtained by the legitimate influence which affection or gratitude gives a relative over the testator. A competent testator may bestow his property upon the objects of his affection, and he may, from gratitude, reward those who have rendered him service; but if one takes advantage of the affection or gratitude of another to obtain an unjust will in his favor, using his position to subdue and control the mind of the testator so as, substantially, to deprive him of his free agency, then the fact that affection or gratitude was the moving cause makes it no less a case of undue influence. In this case, in the space of about a year, we find the testator executing three successive instruments, in which the share of his wife goes on increasing. We cannot presume that his bounty to his wife and her relatives was prompted by affection. On his part, his marriage was a matter of convenience, and he had lived with his wife less than two years when the last instrument was executed, and less than one when the first was executed. It is not a case where husband and wife had lived together for years after a marriage prompted by mutual affection, which had been increased

by years of tender care and a thousand acts of love and kindness, until the husband deemed no bounty he could bestow upon his wife too great. It is the case of a scheming woman, marrying an old man, her uncle, broken in body and enfeebled in mind, and then scheming to secure an undue share of his property for herself and her relatives. We cannot presume that the testator was influenced by gratitude. It is true that she rendered him faithful and valuable service. She was diligent and kind in her constant attention to his wants; so she was before her marriage, at \$14 per month. By his marriage with her he had elevated her to a condition of independence, and had secured to her, by operation of law, an income by law far in excess of her reasonable wants. A change from \$14 per month to \$12,000 per year was certainly all the reward which mere gratitude would prompt or be expected to bestow. How, then, is this will to be accounted for? She was the constant attendant of the testator; his only organ of communication with others. He was entirely dependent upon her for all his wants. She procured the appointment of her brother as his agent, and thus had the entire control and management of his estate. She introduced her brother and mother into the household, and his own children, though not formally shut out of his house, were probably not welcome visitors, judging from the death-bed scene, when she refused to send for them to see their dying father. Upon all occasions, so far as disclosed in the evidence, he was submissive to her will. She procured the will to be drawn, instructed the scrivener, and had it executed when he was speechless. Besides the large bounty conferred upon her, the *corpus* of the estate is tied up, and placed in the control of her brother. She was alone with him, and had every opportunity, in the helpless condition of his body and the enfeebled condition of his mind and will, to impose upon him, and subdue him entirely to her will. We have no direct proof of what she did, because no witnesses were present, and she was not sworn. These and the other circumstances above alluded to, and all the inferences to be drawn from the immense mass of evidence given before the surrogate, convince us that this will and the codicil were the result of undue influence, imposition, or fraud of some kind, and that they should not be admitted to probate. It matters not that she did not take for herself and relatives a larger share of his estate. She took enough to show her grasping disposition and overpowering influence.

I freely admit that there are some difficulties standing in the way of the conclusion which we have thus reached, and that strong arguments were urged, with great ability, for the proponents by their learned counsel; but the difficulties lying in the pathway of the proponents are still greater. An immense estate should not be disposed of by a will more or less unjust, and tied up by complicated provisions, except upon clear and satisfactory proof that it is really the will of a competent testator, exercising his free agency.

As said by Lord BROUGHAM in *Panton v. Williams*, supra: "It is much less material that those who seek to impeach a testamentary instrument should be unable to explain certain things in their case, and should be forced to admit that their argument is not, in every point, consistent with all the facts, than that they who seek to establish the will should give no rational, consistent, or intelligible solution of those difficulties which incumber their supposition and obstruct the path towards the conclusion they would have us arrive at."

Our attention is called to certain rulings of the surrogate excluding questions put to witnesses by the counsel of proponents, and the claim is made that gross errors were committed prejudicial to the proponents. I have carefully considered all of them, and believe that most of the rulings were clearly right, and if any of them were wrong they were not of such a character as materially to affect the case, and hence are not grounds for reversal upon this appeal. *Clapp v. Fullerton*, 34 N. Y. 190; *Gardiner v. Gardiner*, Id. 155, 164.

The judgment must be affirmed, with costs.

(17 Ohio St. 302.)

MONROE et al. v. BARCLAY et al.

(Supreme Court of Ohio. Dec. Term, 1867.)

1. FRAUD OR UNDUE INFLUENCE IN PROCURING WILL.

To invalidate a will for fraud or undue influence, it must appear that the fraud or undue influence had some effect upon the testator in producing the very act of making his will.

2. SAME.

A will cannot be impeached for undue influence, unless the influence under which it is made is such and is so exerted as to induce a disposition by the testator of his property contrary to his own wishes and desires. It is immaterial how the influence was acquired, if it was exerted in a manner overcoming or destroying the free exercise of testator's will in the disposition of his property.

3. SAME—UNLAWFUL MARITAL RELATIONS.

The fact that the influences producing a will sprang from an unlawful marital relation between testatrix and legatee will not render the will void, unless such influences were exerted in restraint of the free exercise of her will by the testatrix. *Dictum* in *Dean v. Negley*, 41 Pa. St. 312, disapproved.

4. SAME—INSTRUCTIONS TO JURY.

On the contest of a will the court refused to charge that if a man knowingly and wrongfully marries and cohabits in a state of adultery with a woman who is the lawful wife of another man, and by the influence of such marriage and cohabitation procures a will from her in his favor, and disinheriting her real husband, that will is void for illegal influence. *Held* no error, for, unless the influence placed testatrix under some restraint overcoming her free agency, it would not invalidate the will, and such restraint could not necessarily be implied from the assumed facts, and that the question of the existence of such restraint was properly left to the jury.

Error to district court, Mahoning county.

Action brought by George Monroe, Catherine Monroe, and Erastus Jacobs against John McClelland and Francis Barclay in the court of common pleas to

set aside the will of Mary McClelland, deceased, on the ground of fraud, undue influence, and want of testamentary capacity. It appeared at the trial before a jury that deceased married Erastus Jacobs in 1838, and that they lived together until 1852, when he went to California; that deceased and McClelland were married by defendant Barclay, a justice of the peace, in 1856, and lived together as husband and wife until her death. The plaintiffs gave evidence tending to show that McClelland married Mary for her property only; that he combined with others to induce her to make a will; that she was advised to marry him, and that she had a right so to do; that McClelland was about 35 years of age at the time of the marriage, and that Mary was over 57; that she was deformed, filthy, drunken, profane, and lewd; and that they lived together most unhappily. The defendants gave evidence tending to establish her capacity to make a will, and to show that before and ever since her marriage with McClelland she expressed her determination not to give her property to the plaintiffs. They further gave evidence tending to rebut all fraud or undue influence upon the testatrix. Verdict and judgment for defendant. On error to the district court, the judgment was affirmed, and plaintiffs filed their petition in error.

Geo. M. Tuttle and John M. Stull, for plaintiffs in error. *F. E. Hutchins*, for defendants in error.

DAY, C. J. The original case was a proceeding in the court of common pleas, to contest the validity of the last will of Mary McClelland, deceased, upon three grounds: (1) That at the time of executing the will she was not of sound mind and memory; (2) that she was fraudulently induced to make the will; (3) that the will was procured by undue influence of defendants upon the testatrix. The issues joined by the parties upon these grounds were tried to a jury, and a verdict was rendered in favor of the defendants, sustaining the will.

The testimony is not fully set forth in the bill of exceptions. It is therefore to be presumed that the finding of the jury was, under the charge of the court, warranted by the evidence.

The only errors insisted on here arise upon exceptions taken by the plaintiffs to the refusal of the court to charge the jury as requested by them and to the charge as given. The plaintiffs submitted to the court 21 propositions in writing, which they requested the court to give in its charge to the jury. It is stated in the record that "the court refused to charge as requested, except as stated" in the charge given to the jury; and that the plaintiffs excepted to the "refusal to charge as requested, and to the charge, so far as the same is contrary to said request."

The charge and the propositions submitted by the plaintiffs are fully set forth in the bill of exceptions, but no reference is made in the charge to any one of the propositions; so that it is not specified in the record which one of the propositions the court refused to give as requested. This

is left to be discovered, by seeing what part of the plaintiffs' requests were not embraced in the charge given. It will be seen, moreover, that the plaintiffs excepted to the charge so far only as the court omitted to adopt the written propositions submitted by them, and so far as the charge was contrary thereto. It is not deemed necessary, for the purpose of presenting the questions made by the exceptions, to recite here said propositions or the charge in full. Suffice it to say that most of the propositions were substantially given in the charge to the jury as requested. This does not seem to be strenuously controverted by the counsel for the plaintiffs, except as to the propositions numbered from 16 to 20, inclusive. Indeed, the whole controversy, arising out of the neglect of the court to charge as requested, and upon the charge as given, may be fairly presented by stating these five propositions, and the charge relating to them. The propositions are as follows: "(16) If, previous to the will being made, John McClelland, or any person acting in concert with him, took advantage of imperfect, though not absolutely unsound, judgment on the part of the testatrix, and, by advice known by them to be false, induced her to believe that she owed to Erastus Jacobs no duty as a wife, and she made the will under the continued influence of that persuasion, the will is void. (17) That for this purpose it makes no difference whether it relates to matters of fact merely, or whether it related to matters of judgment only, provided it related to matters about which she, in her imperfect condition of judgment, might be, and actually was, misled by the advice. (18) If, at the time of making the will in question, Mary Jacobs, the testatrix, from false advice, knowingly given by John McClelland, or by any other person acting with him, believed that Erastus Jacobs was not her lawful husband, when in fact he was, and that John McClelland was her lawful husband, when in fact he was not, the will is void. (19) It makes no difference whether the false advice thus given was in relation to some matter of fact or in relation to some matter of law, concerning her relation to Jacobs and McClelland, provided she, being then possessed of impaired powers of judgment, believed the advice to be true, and acted accordingly. (20) If a man knowingly and wrongfully marries and cohabits in a state of adultery with a woman who is the lawful wife of another man, and whose husband has not forfeited his claims to her comfort and society, and, by the influence of such marriage and cohabitation, procures a will from her in his favor, and disinheriting her real husband, that will is void for illegal influence."

It is to be observed that these propositions make no allowance for any other facts or circumstances which might modify the assumed facts, but assert that the facts assumed would, under any circumstances, invalidate the will.

Under the sixteenth proposition, it is assumed that it would make no difference when, or for what purpose, the testatrix

was induced to believe that she owed to Erastus Jacobs no duty, no matter if it was for a purpose having no reference to a disposition of her property; still it is assumed that, if the advice was ever given for any purpose, and the false belief continued, the will is void, although the advice had no effect whatever in producing the will. Under the seventeenth proposition it is claimed that the will would be void if the testatrix was misled by the false advice, without assuming that she was thereby induced to make the will, or that such advice had the least influence on the testamentary act. Indeed, these two propositions, taken together, assume that, if the testatrix was, at any time and for any purpose, misled by the false advice of McClelland as to her duty to Jacobs, and remained under such false impression when the will was made, though it had no relation thereto, and in no way tended to produce it, still the will was void.

The same may be said, substantially, as to the eighteenth and nineteenth propositions. In the nineteenth, which is the most explicit, it is not assumed that, in acting upon the false advice, she did so in relation to the will. It is undoubtedly well settled that, to invalidate a will for fraud or undue influence, it must appear that the fraud or undue influence had some effect "upon the testator in producing the very act of making his will." Redf. Wills, 516, 524, 525, 527. But, however this may be, the most that can be claimed of these four propositions is that they are based on that kind of undue influence which amounted to fraud upon the testatrix. This is the gist of them; and upon a fair construction of the charge, so far as they tended to induce the will, they were substantially given to the jury. It is difficult, therefore, to see wherein the plaintiffs were not permitted to have all the benefit of these propositions, to which they were entitled. Upon this point the court charged the jury "to inquire whether any fraud or misrepresentations were resorted to to induce the execution of this will. If such fraud was exercised, then it would, however slight, destroy the validity of the will; that is, if it was sufficient to and has, in your judgment, tended to induce the execution." Here the court, in reply to these four requests, told the jury that if "any fraud or misrepresentations were resorted to to induce the execution of the will, * * * however slight, * * * If it tended to induce the execution" thereof, the will was void. If these requests are construed as relating to the act of the testatrix in making the will, then the plaintiffs had the full benefit of them in the charge. In that case, the record does not show affirmatively that they were refused by the court, or that they are embraced in the exceptions taken by the plaintiffs.

But the point that seems to be chiefly relied on by the plaintiffs is made on the twentieth proposition. Upon the facts there assumed, it was claimed, as a presumption of the law, that the will was produced by illegal, and therefore undue, influence. The court did not accede to this proposition, but left the question of undue influence to be determined by the

jury, under the following instructions relating to this and other propositions: "Inquire whether, through the exercise of force, or by fear produced, or in any manner, such an influence was exerted over her as to induce her to make a disposition of her property contrary to her own will and inclinations; or whether such an undue and overruling influence was exercised upon her mind as to control or overpower her own inclinations and judgment, or induce her, without or contrary to her own intention and will, to execute the paper. If either of these propositions are found in the affirmative, it would defeat the will." Construing the charge strongest against the plaintiffs, it would seem that the court intended to be understood as holding the law to be that, in the absence of fraud, no matter by what influence a testator may be exercised, so long as it does not overpower his inclinations and judgment, and induce a disposition of his property contrary to his own wishes and desires, his will cannot be invalidated for undue influence. Indeed, it is not denied but that the charge, as applied to ordinary cases, may be sustained by both reason and authority; but it is claimed that a distinction is to be taken between influences that are lawful and those that are unlawful.

The gist of the claim is that the will was void because it was induced by influences growing out of an unlawful relation. No matter for what reason the testatrix may have been abandoned by her husband, or why she may desire to disinherit him and her kindred, or what obligations may have arisen from the unlawful relation; no matter if the will was made without any influence of the devisee other than that which sprung from their association; and no matter if it was made in accordance with her own inclinations and judgment,—still it is assumed that the will would be void. If no other objection than this was urged against a gift of property between living parties, it would hardly be contended that it would be void. It is difficult to see why a bequest or devise should be subjected to a more stringent rule. Every will, it may fairly be presumed, is prompted by influences strong enough to induce its provisions, and it would seem, therefore, that the most that ought to be claimed from such influences in the contest of a will is to have them submitted to the jury, to enable them to determine whether the testator was misled, or so influenced thereby as to affect his own free choice and judgment in the disposition of his property. The power to make a will is granted by the statute to "any person of full age and sound memory;" and, under its provisions, the will is to be admitted to record as valid when "duly attested and executed, and the testator at the time of executing the same, was of full age and sound mind and memory, and not under any restraint." Swan & C. St. p. 1615, §§ 1, 15. Restrictions are imposed upon none, but all are alike left to the exercise of their own free wills and inclinations in the disposition of their property. The power thus given to dispose of property does

not depend upon the disposition made thereof, nor is it restricted to those who may employ it only for just and wise purposes; but all upon whom the right is conferred may use it without "any restraint." Indeed, it is contemplated by the statute that this is the only way in which it can be exercised. Freedom from restraint is essential to the validity of a will. So careful is the law in this respect, that it will not uphold a will that has been induced by restraint upon the testator, whether in the form of fraud practiced upon him or any other influence that destroys the free exercise of his own will. Redf. Wills, 524, 527. It would be inconsistent with the right conferred by the statute, and with the spirit of the construction it has hitherto received, to sanction restraints upon a testator, based alone on the character of the motives or causes that may have induced any disposition of his property that he may make while in the free exercise of his own inclinations and judgment. He may give his property to whomsoever he pleases; and his motives or reasons therefor, so long as he is "not under any restraint," are matters of his own conscience, for which he is not accountable to the law. His will, executed in conformity to the statute, if it be his own, and not in any sense the will of another, cannot be invalidated, however much its provisions may be disapproved by others.

It is claimed in the proposition under consideration that the will, upon the facts therein assumed, would be void for "illegal influence." In the solution of the question made by this proposition, much of the difficulty disappears when we consider what "influence," as applied to the invalidation of wills, is "illegal." Every will, as before remarked, is the result of influences strong enough to produce it. Since, then, it is the policy of the law to secure to every one the right to dispose of his property in accordance with his individual will, that influence alone is illegal which places the freedom of a testator's will under some kind of restraint. If this be so, it follows that it matters not what may be the origin or character of any influence operating upon a testator, if it does not place him "under any restraint." It would seem to follow, also, that it would be equally immaterial how an individual may have acquired an influence over a testator, unless such influence is exerted in a manner that tends to restrain the free exercise of his will in the disposition of his property. It is claimed in this proposition that the influence that produced the will was illegal only because it sprang from an unlawful relation. If this be so, then the principle would be equally applicable to any other unlawful relation, and would destroy a will made under influences springing therefrom, although the testator, without being placed under restraint, could not be persuaded to make a will otherwise than as prompted by such influences. However reprehensible such influences may be, if a testator voluntarily chooses to be actuated by them, it is a privilege he may enjoy under the law that secures to every one alike the right to dis-

pose of his property without restraint upon his own judgment and conscience. It is undoubtedly well settled that a will cannot be invalidated because it was produced by influences springing from a lawful marital relation, unless such influence has been unduly exerted. The influence arising from an unlawful marital relation may be as strong as that of the other; but, unless it impairs more than the other the free exercise of the testator's will, it is difficult to see how the influence arising from the unlawful relation is necessarily such undue influence as will invalidate a will, while that of the other will not. It would seem, upon the principles already stated, that the question would be essentially the same in either case, whether the influence had been, in fact, exerted in restraint of the testator's will. However justly an adulterous marital relation may be reprobated, it by no means follows that every will produced by influences arising from that relation is tainted with such turpitude that to uphold it would "do violence to the morality of the law." This is the theory upon which the claim of the plaintiffs rests. But the moral test will not in all cases avail. If the principle be correct, it makes no difference which party makes the will; whether the devise be from the woman to the man, or the man to the woman, it would be equally void. It would be easy to suppose cases where considerations of moral obligation, as well as that of public duty, would require a man to make suitable provision for a woman with whom he had sustained this relation. In such cases it would do no violence to the morality of the law to sustain such provision, though it be made by will, and induced solely by influences springing from the unlawful cohabitation.

It may, however, be admitted that the influences growing out of an unlawful marital relation do not stand, and should not be permitted to stand, upon an equal footing with those coming from the lawful relation; but the question recurs whether the difference is in matter of law or of fact. If it be the former, then every will induced by an unlawful relation is void, though the testator might not have been "under any restraint;" but this, it has been shown, is contrary to the general policy of the law. If it be the latter, then the proof of the unlawful relation should go, with the other evidence, to the jury, to enable them to determine the question of undue influence. We think this would be in accordance with the law, and, in general, best subserve the ends of justice.

We have not been furnished with authorities, nor do we see any sufficient reason, to warrant us in making this class of cases an exception to the general principles relating to the validity of wills. It is true that the position of the counsel for the plaintiffs is strongly supported *obiter* in the able opinion delivered in the case of *Dean v. Negley*, 41 Pa. St. 312. The point there ruled, however, went to the extent only that proof of the making a will under and in the direction of an unlawful relation like that in this case was such evidence of undue influence "that it may jus-

tify a verdict against the validity of the will;" and it was held, therefore, that it was error to exclude it from the jury. That the same court must hold the question to be one "of fact, merely," and not "a presumption of law," is shown in a still more recent case, where it was declared that "undue influence, to avoid a will, must be such as to overcome the free agency of the testator at the time the instrument was made." *Eckert v. Flowry*, 43 Pa. St. 46; *Redf. Wills*, 534. The propositions which the counsel for the plaintiffs requested the court to give in its charge to the jury, although separately numbered, were in fact, many of them, a connected series of propositions, dependent one upon

another, some of which, we have shown, the court could not properly give. Other independent propositions were properly refused, as has been shown, and the remaining ones were embraced in the charge. There was, therefore, no error in refusing to charge as requested. For the reasons already stated we think that there was no error in the charge as given to the jury by the court of common pleas. It follows that the district court rightfully affirmed the judgment of that court, and that the judgment of the district court must therefore be affirmed.

WHITE, WELCH, BRINKERHOFF, and SCOTT, JJ., concurred.

(See, also, *Marx v. McGlynn*, 88 N. Y. 357; *McMahon v. Ryan*, 20 Pa. St. 329; *Wilson's Appeal*, 99 Pa. St. 545; *In re Mondorf's Will*, 110 N. Y. 450, 18 N. E. Rep. 256; *Davis v. Calvert*, 5 Gill & J. 269; *Griffith v. Diffenderfer*, 50 Md. 466; *Mitchell v. Mitchell*, 43 Minn. 73, 44 N. W. Rep. 885; *Eckert v. Flowry*, 43 Pa. St. 46; *Clarke v. Sawyer*, 2 N. Y. 498.)

(11 Prob. Div. 81.)

WINGROVE v. WINGROVE *et al.*

(*Court of Probate*. Nov. 19, 1885.)

1. UNDUE INFLUENCE IN PROCURING WILL—IMMORAL CONSIDERATIONS.

To establish undue influence sufficient to invalidate a will it must be shown that the testator was coerced into doing that which he did not desire to do. The mere fact that in making his will he was influenced by immoral considerations does not amount to such undue influence, so long as the dispositions of the will express his actual wishes and purposes.

2. SAME.

To establish such undue influence it is not sufficient to show that a person has the power to unduly overbear the mind of the testator; but it must be further shown that that power was so exercised as to produce the will in question.

Plaintiff, as a legatee, offered for probate the will of Elizabeth Wingrove, dated September 15, 1869, and alleged that a codicil, dated October 9, 1880, which revoked some of the gifts to him, was procured by undue influence of defendants. Defendants denied that the codicil was procured by undue influence, and claimed probate of it together with the will. The action was tried by a common jury, who found a verdict for the plaintiff, which was subsequently set aside, and a new trial ordered by a special jury.

Mr. Murphy, Q. C., and *Mr. Gye*, for plaintiff. *Mr. Inderwick, Q. C.*, and *Mr. Pritchard*, for defendants.

Sir JAMES HANNEN, (President,) in addressing the jury said:

Gentlemen of the jury, I must ask your particular attention to the exposition which I am about to give you of the law upon this subject of undue influence, for I find, from now a long experience in this court, that there is no subject upon which there is a greater misapprehension. The misapprehension to which I have referred arises from the particular form of the expression. We are all familiar with the use of the word "influence." We say that one person has an unbounded influence over another, and we speak of evil influences and good influences; but it is not

because one person has unbounded influence over another that, therefore, when exercised, even though it may be very bad indeed, it is undue influence in the legal sense of the word.

To give you some illustrations of what I mean: A young man may be caught in the toils of a harlot, who makes use of her influence to induce him to make a will in her favor, to the exclusion of his relatives. It is unfortunately quite natural that a man so entangled should yield to that influence, and confer large bounties on the person with whom he has been brought into such relation; yet the law does not attempt to guard against those contingencies. A man may be the companion of another, and may encourage him in evil courses, and so obtain what is called an "undue influence" over him, and the consequence may be a will made in his favor. But that, again, shocking as it is, perhaps even worse than the other, will not amount to undue influence. To be undue influence in the eye of the law there must be—to sum it up in a word—coercion. It must not be a case in which a person has been induced by means such as I have suggested to you to come to a conclusion that he or she will make a will in a particular person's favor, because, if the testator has only been persuaded or induced, by considerations which you may condemn, really and truly to intend to give his property to another, though you may disapprove of the act, yet it is strictly legitimate, in the sense of its being legal. It is only when the will of the person who becomes a testator is coerced into doing that which he or she does not desire to do that it is undue influence. The coercion may, of course, be of different kinds. It may be in the grossest form, such as actual confinement or violence; or a person in the last days or hours of life may have become so weak and feeble that a very little pressure will be sufficient to bring about the desired result; and it may even be that the mere talking to him at that stage of illness, and pressing something upon him, may so fatigue the brain that the sick person may be induced, for quietness' sake, to do anything. This

would equally be coercion, though not actual violence.

These illustrations will sufficiently bring home to your minds that even very immoral considerations, either on the part of the testator or of some one else offering them, do not amount to undue influence unless the testator is in such a condition that, if he could speak his wishes to the last, he would say: "This is not my wish, but I must do it." If, therefore, the act is shown to be the result of the wish and will of the testator at the time, then, however it has been brought about,—for we are not dealing with a case of fraud,—

though you may condemn the testator for having such a wish, though you may condemn any person who has endeavored to persuade and has succeeded in persuading the testator to adopt that view, still it is not undue influence. There remains another general observation that I must make, and it is this: That it is not sufficient to establish that a person has the power unduly to overbear the will of the testator. It is necessary also to prove that in the particular case that power was exercised, and that it was by means of the exercise of that power that the will, such as it is, has been produced.

(See, also, *Shailer v. Bumstead*, 99 Mass. 112; *Patten v. Cilley*, 46 Fed. Rep. 892; *Baldwin v. Parker*, 99 Mass. 73; *Tyler v. Gardiner*, 35 N. Y. 559; *Carroll v. House*, [N. J. Prerog. Ct.] 23 Atl. Rep. 191.)

III. ERRORS IN WILLS.

(L. R. 3 Prob. & Div. 250.)

In re Goods of Hunt.

(Court of Probate. May 4, 1875.)

EXECUTION BY MISTAKE OF WILL PREPARED FOR ANOTHER.

Two sisters agreed to make their respective wills so that, upon the death of either, the other should have the joint property for life. One of them prepared both wills in her own handwriting, but upon her death it was found that each sister had executed the will prepared for the other. The will executed by the deceased would, if carried into effect, accomplish her wishes in most respects, but not as to one legacy. Held that, as deceased did not know and approve of the contents of the document she executed, probate should be refused.

Application to probate will.

Sarah Hunt and Ann Hunt, spinsters and sisters, residing together, in 1873 agreed to make their respective wills, the object being that, in the event of the death of either of them, the survivor should enjoy the joint property for life. Two wills were prepared in the handwriting of Sarah. The legacies in each were identical, save that where one gave a legacy to a certain charitable institution the other gave a similar legacy to another charitable institution; and in each case a life-interest was given to the survivor in the bulk of her sister's property. After the death of Sarah Hunt the two wills were found together, indorsed, "The wills of Sarah and Ann Hunt;" but on opening them it was discovered that each sister had executed the will prepared for the other. Most of the persons interested in an intestacy consented that the document executed by the deceased should be recognized as her will, and probate thereof be granted to the executors named in it; but some of the persons were abroad, and could not be communicated with.

Bayford, for the motion.

Sir J. HANNEN. I should be glad to give effect to the intentions of the testa-

trix, by granting probate of this instrument, if I could, but I must not allow myself to be led away from what appears to me to be very plain ground by such a desire. No doubt there has been an unfortunate blunder. The lady signed as her will something which in fact was not her will. If I were to attempt to read it as her will, it would lead to a variety of absurdities. She leaves to her sister, Sarah, that is, to herself, a life-interest in a portion of her property, and all the furniture, plate, etc., which she holds in part with herself. I am asked to treat this as a misdescription. If by accident a wrong name had been introduced, and it was clear what person was intended, the court would give effect to the instrument, providing the mistake could be corrected. But it would be contrary to truth in this case if I acted on such an assumption. If I were to put such a construction upon this will, I should be assuming, in order to do substantial justice, what every one who hears me would know is contrary to the fact. And no court ought to base its judgment on something wholly artificial, and contrary to what every one must see is the real state of the circumstances. It is enough to say that there has been an unfortunate blunder. A paper has been signed as the lady's will which, as it happens, if treated as her will, would to a great extent, although not entirely, carry out her wishes. But in one respect it does not, for by it a legacy is bequeathed to one charity which she intended to leave to another. As regards this legacy, it is suggested that it might be treated as if the deceased did not know and approve of that part of the will. But she did not in fact know and approve of any part of the contents of the paper as her will; for it is quite clear that if she had known of the contents she would not have signed it. I regret the blunder, but I cannot repair it. I reject the motion, but I allow the executors costs out of the estate.

(2 R. I. 99.)

GIFFORD v. DYER.

(Supreme Court of Rhode Island. March Term, 1852.)

MISTAKE OF TESTATRIX IN BELIEVING HER ONLY CHILD TO BE DEAD.

Testatrix made a will in which she gave nothing to her only son, whom she believed to be dead, since he had been absent from home, leaving a family, for 10 years, and had not been heard from during that time. He was in fact alive, and contested the probate of the will. *Held*, that the mistake as to his death could not be shown *dehors* the will, and that, as such mistake did not appear upon its face, and as it also did not appear what would have been the will of testatrix but for the mistake, the will should be admitted to probate.

Appeal from court of probate, Little Compton county.

Abigail Irish, who died December 6, 1850, made a will, two days prior to her death, by which, after making small bequests to the children of Robin Gifford and to others, she gave the residue of her property to her brother-in-law, John Dyer, and her two nephews, Jesse and Alexander Dyer. Robin Gifford, her only child, was not mentioned in the will. The will was offered for probate by John Dyer, executor therein named, and was contested by Robin Gifford. It appeared in evidence that at the date of the will he had been absent from home, leaving a family, for 10 years, unheard from, and was generally considered dead, his estate having been administered upon. Testatrix had resided with John Dyer for some time previous to her death. The scrivener who drew the will testified as follows: "After I had

read the will to her, she asked if it made any difference if she did not mention her son. I asked if she considered him living. She said she supposed he had been dead for years. She said, if it would make any difference, she would put his name in, 'for they will break the will if they can.' I think that was the expression she used. I think she said what she had given to her grandchildren was in lieu of what he would have, but am not positive. I think her son left in 1841, and was not heard of, to my knowledge. She was speaking of a home at Mr. Dyer's, and said what she had given him would pay him well. She said her grandchildren had not been to see her while she was sick." The court of probate admitted the will, and Robin Gifford appealed.

Mr. Sheffield, for appellant. *A. C. Greene*, for appellee.

GREENE, C. J. It is very apparent in the present case that the testatrix would have made the same will had she known her son was living. She did not intend to give him anything if living. But if this were not apparent, and she had made the will under a mistake as to the supposed death of her son, this could not be shown *dehors* the will. The mistake must appear on the face of the will, and it must also appear what would have been the will of the testatrix but for the mistake. Thus, where the testator revokes a legacy, upon the mistaken supposition that the legatee is dead, and this appears on the face of the instrument of revocation, such revocation was held void. *Campbell v. French*, 3 Ves. 321.

IV. WHAT CONSTITUTES A WILL.

(136 Pa. St. 628, 20 Atl. Rep. 567.)

In re CAWLEY'S ESTATE.

(Supreme Court of Pennsylvania. Oct. 6, 1890.)

1. WHAT CONSTITUTES A WILL — WHEN IRREVOCABLE.

Whether any given writing is a will or a contract must be determined by the character of its contents, rather than from its title, or any formal words with which it may begin or conclude. Although a contract and a will are essentially unlike, they may be combined so as to give a testamentary character to what purports to be a contract, or to convert a will into an irrevocable agreement.

2. JOINT EXECUTION—MUTUAL BEQUESTS—REVOCATION.

A brother and sister, owning separate properties, made a will together, which read as follows: "I, Benjamin Cawley, should I be the first to die, and I, Mary Cawley, should I be the first to die, give, devise, and bequeath, and to the survivor of either of us, all the rest and residue of the decedent's estate, both real and personal, to have and to hold and enjoy the same during the life of the survivor," etc.; and directed that, at the expiration of the life-estate, the residue should be divided into nine parts, "three of which parts I give and bequeath," etc., the singular number being used through the

whole instrument. *Held*, that the instrument was the separate will of each, and the survivor, as to her property, had a right to make a new will containing a different disposition thereof.

Certiorari sur appeal to orphans' court, Union county.

The facts are thus stated in the opinion of the court below: "This case arises in the following manner: On the 16th of March, 1886, Benjamin Cawley and his sister, Mary Cawley, both unmarried, made what may be termed a 'joint will and testament,' duly executed, and by which it is directed that, 'upon the death of either, the survivor shall pay all the debts of the decedent if the estate will reach, and bury decedent properly, and provide tombstones. *Secondly*. If Benjamin should be the first to die, or if Mary should be the first to die, each gives to the survivor all the rest and residue of his or her estate for life, and, if needed, the body of the estate so far as is necessary,' and at the death of the survivor, after burial, tombstones, and so forth are paid for, the residue is divided into nine parts, and given to relatives and parties named; and Horace C.

Cawley named executor. Benjamin Cawley died the 12th of August, 1887, and on the 22d August, 1887, the joint will was duly proved as the will of Benjamin, and its provision as to his estate carried into effect; Mary, the survivor, receiving Benjamin's estate for life, as provided in his will. Mary Cawley, however, on the 5th of September, 1887, made a separate will, and revoked the joint will, and died on the 29th January, 1888; and the joint will was offered as Mary's will, and admitted to probate by the register, on the 1st of February, 1888, and letters testamentary issued to Horace B. Cawley, the executor therein named. But, on the same day, Mary's second will, of the 5th of September, A. D. 1887, was also offered for probate; but the register refused to consider it, and treated the joint will as irrevocable, and that it must stand as Mary's last will and testament. From this decision, and admission of the joint will as Mary Cawley's will, and the refusal to allow the proving of her second will, this appeal has been taken to the orphans' court."

J. Merrill Linn and *S. H. Orwig*, for appellants. *Charles S. Wolfe*, *P. L. Hackenburgh*, and *Andrew A. Leiser*, for appellees.

WILLIAMS, J. The question presented by this appeal is one that has not arisen in Pennsylvania until now. It is important to a correct understanding of the real ground of controversy to bear in mind the peculiar characteristics of a contract, and those of a will. A contract is an agreement between parties for the doing or not doing of some particular thing. The undertaking of one party is made in consideration of something to be paid or done by or on behalf of the other party, so that the obligation to do and the right to require performance are reciprocal. A will, on the other hand, is simply a statement of a purpose or wish of the maker as it exists at the time. As often as his purpose or wish changes, he may change the expression of it. When and why a change shall be made depends on himself alone. He is answerable to no one for his determination to make one rather than another disposition of his property. After he has written out his will, and executed it in accordance with the forms of the law, it does not bind him; but, so long as he lives, he may change his own purpose, with or without a reason, and his last purpose properly written out and executed is his "last will and testament," because death makes any further change impossible. The binding force of a contract comes from the *aggregatio mentium* of the parties. The binding force of a will comes from the fact that it is the last expressed purpose of the testator in regard to the disposition of his property after his own death. While he lives, it is without force or value, but it begins to speak when he ceases to do so, and thereafter is heard in his stead. Although these instruments are so unlike, they may be, and sometimes are, combined so as to give a testamentary character to what purports to be a contract, or to convert a will into an irrevocable agreement. Whether any given writing is a will or a contract must be

determined by the character of its contents, rather than from its title, or any formal words with which it may begin or conclude. The familiar form of a will is that by which the testator directs how his property shall be disposed of after his death, and may be distinguished or described as the simple will of the maker. If two or more persons own property in common, they may convey it by joining in a deed, or by executing separate conveyances at their convenience. They may transmit the title, each for himself, by a separate will; and there is no objection, on principle, to their joining in a testamentary disposition of it. Such a will might be properly called a "joint will," because executed jointly by several owners, as a means of transferring their several titles to one devisee. The validity of a joint will was at one time denied in England, and has been denied in some of the United States, but the reasons for such denial relate rather to questions of probate than to the power of the several testators, and do not seem to have been regarded as settling the question in the countries where the decisions were rendered. 1 Williams, Ex'rs, 10. Whether after the death of one or more of the makers of such a will the surviving maker may make a valid revocation as to his own title or share of the property devised is an unsettled question, and is not involved in the case before us, for the property to which this will relates was not held in common by the testators. Another class of questions is presented when two or more persons make reciprocal testamentary provisions in favor of each other, whether they unite in one will or each executes a separate one. Such wills may be described as "mutual" or "reciprocal." Their validity does not seem to be doubted after the death of the respective testators; but the extent of the power of revocation in the survivor after the death of one or more of the testators is a question still in controversy, and upon which different conclusions have been reached. In *Evans v. Smith*, 28 Ga. 98, the will was signed by two, and presented by the survivor for probate. No revocation was attempted, and the only question really before the court was the validity of the paper as the will of the deceased signer. The court held it valid, characterizing it as a "double will." In *Lewis v. Scofield*, 26 Conn. 452, a similar will was presented, and its validity upheld by the court. In *Betts v. Harper*, 39 Ohio St. 639, the testators were tenants in common. After the death of both, it was probated as the separate will of each, and the earlier case of *Walker v. Walker*, 14 Ohio St. 157, which had denied the validity of such a will, was distinguished and qualified. The will of a husband and wife making reciprocal provisions for each other, and executed by both, was sustained in *Diez's Will*, 50 N. Y. 88. In *Schumaker v. Schmidt*, 44 Ala. 454, two persons, who describe themselves as "friends of many years standing," joined in a will by which the survivor was to take the property of the one dying first. Auerback, one of the joint makers, made a later will, with a different dispo-

sition of his property, and died. The survivor insisted on the irrevocability of the first will, and claimed the estate, but the court upheld the last one. The point in controversy was stated in the opening sentence of the opinion of the court as follows: "Was the writing between Schumaker and Auerback a compact, and not a will, or a will containing a compact, and therefore irrevocable?" The conclusion of the court was that the writing was not a compact, but a will, and therefore revocable at pleasure. It is worthy of note that the only consideration expressed for the mutual provisions made by the first will was the "mutual esteem" which each entertained for the other. This might change in degree, or cease altogether, at any time. While it existed, it explained the mutual or reciprocal provisions contained in the will. It afforded not a consideration, but a reason, for them.

The will now before us was executed by a brother and sister. They were single, had lived many years together, and were feeling the infirmities of age. One owned a house and lot worth about \$3,000. The other owned bank-stock of about the same value. Their household goods seem not to have been the exclusive property of either. They appear to have lived together in the house, and used the income from the bank-stock without keeping an account with each other. By their will they provided that the survivor should have the property of the one first to die during life, and that it should then go over to remainder-men named. The learned gentleman by whom it was drawn seems to have had *Walker v. Walker*, 14 Ohio St. 157, in his mind, and to have drawn the paper with the purpose of steering clear of the difficulty suggested by it. To this end the will is made to speak for each deviser separately, thus: "I, Benjamin Cawley, should I be the first to die, and I, Mary Cawley, should I be the first to die, give, devise, and bequeath and to the survivor of either of us, all the rest and residue of the decedent's estate, both real and personal, to have and to hold and enjoy the same during the life of the survivor, without impeachment for waste, and with leave to use the body of the estate for necessity." After the payment of debts and expenses, and the expiration of the life-estate, the will directs that the residue be divided into nine parts, and then proceeds: "Three of which parts I give and bequeath to John Cawley; two parts to Hepburn Cawley; one part to Horace Cawley; one part to Mary Henson; * * * one part to Ada Gilmore; * * * and one part to Emma Harter." H. C. Cawley was made a trustee for Ada, and her share was devised to him thus: "I give and bequeath to H. C. Cawley, in trust," etc.; and the will then defines the nature of the trust, and uses the words, "I distinctly declare that the above trust is an active one." The singular number is invariably used throughout the will, each testator speaking for himself or herself only, and neither attempting to speak for the other or of the other's property. Each seems to have desired to make the same disposition

of what he or she owned. Both adopted the same written expression of that desire, and executed it. The will so made must be regarded, therefore, as the separate will of each testator, as fully as though the will of each had been separately drawn up and signed. There was no joint property or joint devise. It is not, therefore, a joint will. It is not a contract between the makers in form or in effect. No consideration passed from one to the other, and none is suggested, except the affectionate interest which this aged brother and sister felt for each other. This moved them to provide for each other's comfort by a life-estate in the survivor, but beyond that each gave to the remainder-men only what each owned. Such a will is properly described by the phrase in *Evans v. Smith*, supra, as a "double will." It must be construed and treated as the separate will of each testator who signed it, in the same manner as though a separate copy had been executed by each. It was therefore revocable by both. Benjamin Cawley did not revoke, and his will is to be executed in accordance with its terms. Mary Cawley has exercised the power of revocation, and changed the ultimate destination of her property. Her last will must be followed, therefore, in the distribution of her estate. The decree of the court below is affirmed, at the cost of the appellant.

(86 Ala. 110, 5 South. Rep. 497.)

SHARP *et al.* v. HALL.

(*Supreme Court of Alabama*. Feb. 26, 1889.)

1. WHAT CONSTITUTES A WILL—DEED OR WILL.

An instrument in writing conveying property, but reserving to the maker "the use, control, and consumption of the same" during the maker's lifetime, may be either a deed or a will, the class to which it belongs being determinable upon all the circumstances surrounding the parties and attending its execution. But the intention of the maker is the controlling inquiry; and that intention is to be gathered primarily from the language of the instrument itself.

2. SAME—EVIDENCE.

Upon that question it is proper to consider the facts that the maker of the instrument was without near relatives; that she was attached to the donee, who was a member of her household; that she employed the scrivener to write a will, and executed the instrument drawn by him, knowing its contents, and had it attested; that she did not deliver it, but had it placed in an envelope with an indorsement that it was not to be opened until her death; that she carefully preserved it until she died; that the maker did not dispose of all her property; and that a clause in such instrument stated that it was intended in part to dispense with the necessity of taking out letters of administration on the maker's estate after her death.

Appeal from probate court, Colbert county; JOHN A. STEELE, Judge.

Proceedings to probate an alleged will of Ann E. Hornsby, deceased. The instrument in question was signed by Mrs. Hornsby, under seal, attested by two witnesses on an acknowledgment of her signature, February 23, 1886, and was in the following words: "The state of Alabama, Colbert county. These presents show that, in consideration of the love and affection I have to Julia M. Hall, I do here now

give and deliver to her the following property, to-wit, a certain lot, or part of lot, situated in the city of Tusculumbia, known as part of lot No. 317, according to the plat of said city, [describing it by metes and bounds,] together with all the tenements and hereditaments thereunto appertaining, all of which I now hold and possess. But I do hereby reserve the use, control, and consumption of the same to myself, for and during my natural life; and this is done in part to do away with the necessity of taking out letters of administration after my death. Teste my hand and seal, this — day of February, 1886." Mrs. Hornsby died in July, 1887. Letters of administration on her estate as an intestate were granted soon after her death, to Robert B. Lindsay, who, while searching among her papers, found the above instrument in a locked drawer, inclosed in an envelope on which were written the words, "Not to be opened until after my death." Mrs. Hornsby's name was not signed to the memorandum, nor was it in her handwriting. The administrator delivered the paper to Julia M. Hall, August 2, 1888, and it was propounded for probate by her. G. A. and U. M. Sharp, who claimed as next of kin, contested the probate on the following grounds: "(1) Because said written instrument is not in fact the will and testament of said Ann E. Hornsby; (2) because said instrument was not duly executed, so as to pass title to said real estate under the laws of Alabama; (3) because said instrument was not executed by said Ann E. Hornsby; (4) because said instrument is not testamentary in its character; (5) because said instrument was not executed as required by law of a last will and testament." An issue was duly formed. On the trial of the cause the contestants objected, and excepted to the admission in evidence of the circumstances of the making of the instrument contested; of the relation the petitioner bore the deceased, Ann E. Hornsby; of the non-delivery of the instrument; and of the other facts as shown by the opinion. There were also separate exceptions reserved to the admission of the testimony of the witness Davis to the effect that he considered the instrument a will, and that he intended to draft a will. The defendants requested the following charge in writing, and excepted to the court's refusal to give the same: "(6) The fact, if it be a fact, that Mrs. Hornsby did not dispose of all the property, must be considered with the other evidence by the jury to ascertain whether or not the instrument was intended to be a will." There was a trial by jury, and a verdict for the proponent, followed by a judgment admitting the will to probate. Contestants appeal.

Kirk & Almon, for appellants. *J. B. Moore*, for appellee.

STONE, C. J. There are few, if any, questions less clearly defined in the law-books than an intelligible, uniform test by which to determine when a given paper is a deed, and when it is a will. Deeds, once executed, are irrevocable, unless such power is reserved in the instrument. Wills are al-

ways revocable so long as the testator lives and retains testamentary capacity. Deeds take effect by delivery, and are operative and binding during the life of the grantor. Wills are ambulatory during the life of the testator, and have no effect until his death. Out of this has grown one of the tests of testamentary purpose, namely, that its operation shall be posthumous. If this distinction were carried into uniform, complete effect, and if it were invariably ruled that instruments which confer no actual use, possession, enjoyment, or usufruct on the donee or grantee during the life of the maker are always wills, and never deeds, this would seem to be a simple rule, and easy of application. The corollary would also appear to result naturally and necessarily that if the instrument, during the life-time of the maker, secured to the grantee any actual use, possession, enjoyment, or usufruct of the property, this would stamp it irrefutably as a deed. The authorities, however, will not permit us to declare such inflexible rule. A declaration of trust by which the grantor stipulates to hold in trust for himself during life, with remainder to a donee, or succession of donees, certainly secures no use, enjoyment, or usufruct to the remainder-man during the grantor's life. Yet it is a deed, and not a will. 1 Bigelow, Jarm. Wills, 17, and notes; Gillham v. Mustin, 42 Ala. 365. Can a tangle distinction be drawn between such case and a direct conveyance, in form a deed, by which A. conveys to B., to take effect at the death of A.? The human mind is not content with a distinction that rests on no substantial difference. Conveyances reserving a life-estate to the grantor have been upheld as deeds. 2 Devlin, Deeds, § 983; Robinson v. Schly, 6 Ga. 515; Elmore v. Mustin, 28 Ala. 309; Hall v. Burkham, 59 Ala. 349. In Daniel v. Hill, 52 Ala. 430, 436, this court said: "A deed may be so framed that the grantor reserves to himself the use and possession during his life, and on his death creates a remainder in fee in a stranger." Almost every conceivable form of conveyance, obligation, or writing, by which men attempt to convey, bind, or declare the legal *status* of property, have, even in courts of the highest character, been adjudged to be wills. The form of the instrument stands for but little. Whenever the paper contemplates posthumous operation, the inquiry is, what was intended? 1 Bigelow, Jarm. Wills, 20, 25; Habbergham v. Vincent, 2 Ves. Jr. 204; Jordan v. Jordan, 65 Ala. 301; Daniel v. Hill, 52 Ala. 430; Shepherd v. Nabors, 6 Ala. 631; Kinnebrew v. Kinnebrew, 35 Ala. 638. The intention of the maker is the controlling inquiry, and that intention is to be gathered primarily from the language of the instrument itself. Dunn v. Bank, 2 Ala. 152. The intention cannot be proved by a witness speaking directly thereto. But this does not, in cases of inapt phraseology,—such as the present instrument discloses,—preclude proof of instructions given to the draughtsman, in reference to the nature of the paper he was expected to prepare. In Green v. Proude, 1 Mod. 117, 3 Keb. 310, the paper had striking characteristics of a deed; but the court said:

"Here being directions given to make a will, and a person sent for to that end and purpose, this is a good will." Speaking of this case, Jarman (1 Bigelow's Ed. p. 19) says: "The court seems to have been influenced by the circumstance that the person who prepared it was instructed to make a will." In *Wareham v. Sellers*, 9 Gill & J. 98, the court decided that testimony should have been received of "conversations of the deceased, made at the time of executing the said paper, and from the other circumstances, that the said P. S. made and executed the said paper as and for his last will and testament, and intended it as such." In this case the controversy was whether the paper was a deed or a will. To the same effect is *Witherspoon v. Witherspoon*, 2 McCord, 520. So all the attending circumstances may be put in proof as aids in determining whether the maker intended the paper should operate as a deed or a will, whenever it is so framed as to postpone actual enjoyment under it until the death of the maker. *Gillham v. Mustin*, 42 Ala. 365; *Daniel v. Hill*, 52 Ala. 430; *Campbell v. Gilbert*, 57 Ala. 569; *Jordan v. Jordan*, 65 Ala. 301; *Rice v. Rice*, 68 Ala. 216; *Lee v. Shivers*, 70 Ala. 288; 1 Bigelow, *Jarm. Wills*, 25; *Gage v. Gage*, 12 N. H. 371; *Mealing v. Pace*, 14 Ga. 596, 630; *Symmes v. Arnold*, 10 Ga. 506; *Jackson v. Jackson*, 6 Dana, 257. Another pertinent inquiry: If a paper cannot have operation as a deed, but may as a will, then in doubtful cases we should pronounce it a will, *ut res magis valeat*. Bigelow, *Jarm. Wills*, 21, 22, 24, 25; *Attorney General v. Jones*, 3 Price, 379; *Gage v. Gage*, 12 N. H. 371; *Symmes v. Arnold*, 10 Ga. 506.

The instrument sought to be established as a will is in form a nondescript. It clearly shows on its face that the donee or grantee was to have no actual enjoyment of the property—no usufruct—during the life of the maker. Its language is: "I do hereby reserve the use, control, and consumption of the same to myself for and during my natural life." We hold that the paper, on its face, falls within the indeterminate class, which, according to circumstances, may be pronounced a deed or a will. We also hold that, on the trial of the issue, it was competent to prove that the maker was without lineal or other very near relatives; that she was attached to the donee, who was a member of her

household; that she sent for the draughtsman of the paper, and employed him to write her will, and that, in pursuance of such employment, he wrote the paper in controversy; that she signed it with a knowledge of its contents, and had it attested; that she did not deliver it, but had it placed in an envelope, and indorsed, "Not to be opened till after my death;" and that she carefully preserved it in such envelope until her death. Now, all these facts and circumstances, if proved and believed, were competent and proper for the consideration of the jury in determining the issue of *devisavit vel non*. And the fact, if believed, that the paper had never been delivered, and therefore could not take effect as a deed, should also be considered in arriving at the maker's intention.

In excluding from contestants' exceptive allegation the averment that the paper is a deed, the probate court committed a technical error. That was the real issue in the case. This ruling, however, did the contestants no injury, as they had the benefit of the defense it sought to interpose. 3 Brick. Dig. p. 405, § 20.

The paper over which the present contention arose contains the following clause: "And this [the execution of the paper] is done in part to do away with all need or necessity of taking out letters of administration after my death." This clause is a circumstance which the jury may look at and consider in determining whether Mrs. Hornsby intended that Julia M. Hall should take or enjoy any interest during the former's life. It is not conclusive, but must be weighed with the other evidence. It would probably be more weighty if it made provision for Mrs. Hornsby's entire estate. Attempts—fruitless, of course—are sometimes made to dispense with administration, even in documents that are unmistakably testamentary.

Charge No. 6, asked by contestants, should have been given. The remaining charges asked by them were, in the light of the evidence, calculated to confuse or mislead, and were rightly refused on that account.

We have now considered all the questions we deem necessary. In a very few of the many rulings the probate court erred.

Reversed and remanded.

(See, also, *Meck's Appeal*, 97 Pa. St. 313; *Basket v. Hassell*, 108 U. S. 267, 2 Sup. Ct. Rep. 634; *Wright v. Wright*, 5 Ind. 389.)

(L. R. 13 Ir. 13.)

In re KEHOE.

(Court of Probate. Jan. 28, 1884.)

1. INCORPORATION OF DOCUMENTS BY REFERENCE IN WILL.

To incorporate a document in the probate of a will, three things are necessary: (1) that the will should refer to the document as then in existence; (2) proof that the document propounded was in fact written before the will was made; and (3) proof of the identity of such document with that referred to in the will.

2. SAME.

Testator bequeathed all property he died possessed of to his executors, to be disposed of in charity in such manner as "I may direct them; and, in case I may not leave directions or instructions, then they may dispose of it in such manner as they think fit." He signed a paper bearing the same date as the will, and in his own handwriting, containing directions for the management of his property for charitable purposes, and headed, "Directions to the executors of my last will, executed the 13th of February, 1879—How they are to manage my affairs." Held, that the will did not sufficiently describe the paper of directions as then existing, and that

parol evidence was not admissible to identify it as the document referred to in the will, and the incorporation of the directions with the probate should be refused.

Motion for probate, and that certain directions be ordered to be incorporated in the will of the testator, the Rev. J. Kehoe. An affidavit of the Rev. Simon McWry was filed, as follows: "That, to the best of my knowledge and belief, the paper writing marked 'A,' now produced and shown to me, entitled 'Directions to the executors of my last will and testament, executed this 13th day of February, 1879—How they are to manage my affairs,' signed John Kehoe, P. P., and dated February 13, 1879, which is all in the handwriting of the said Rev. John Kehoe, was written out by him previous to the execution of his will; and immediately after such execution copies of said will and said direction, previously made by the said testator, and by one Maurice Kealy, were placed by testator in an envelope, and handed to me for safe custody." The Rev. Patrick F. Nolan, who was appointed executor of the will by the codicil of the 20th of July, 1883, made the following affidavit: "The testator, by his will having bequeathed all his property in trust to be disposed of in such manner as he might direct, did give a direction in writing as to the disposal of the same, as of same date as of the will, viz., the 13th of February, 1879, and upon which direction, marked with the letter 'A,' I have indorsed my name."

William P. Ball, for executor.

WARREN, J. The Rev. John Kehoe, the testator, made a will dated the 13th of February, 1879, which contained this clause: "I hereby bequeath to the Right Rev. James Walsh and the Rev. Michael Conroy all property I die possessed of," "in trust to be disposed of in charity in such manner as I may direct them; and, in case I may not leave directions or instructions, then they may dispose of it in charity in such manner as they may think fit;" and the same persons are named executors. One of these executors—Mr. Conroy—having died, the testator made a codicil, dated the 20th of July, 1883, by which he nominated the Rev. Patrick Nolan an executor of this will. The testator signed a paper bearing the same date as the will, containing directions for the management of his affairs for charitable purposes. This paper is in the handwriting of the testator, and is headed, "Directions to the executors of my last will, executed on the 13th day of February, 1879—How they are to manage my affairs." The court has been moved for probate of the will and codicil of the testator, with the paper of directions incorporated.

The law of the subject of the incorporation of papers, so far as it is necessary to consider it on the present application, is thus stated in Jarman on Wills, (volume 1, p. 90:) "Three things are necessary: (1) That the will should refer to some document as then in existence; (2) proof that the document propounded was in fact

written before the will was made; and (3) proof of the identity of such document with that referred to in the will." The affidavit of the Rev. Simon McWry is slightly ambiguous, (In re Ash, 11 Ir. R. Eq. 60, note,) in consequence of the introductory words, "to the best of my knowledge and belief;" but still, if that affidavit be admissible in evidence, I think it sufficient to prove that the paper of directions was in existence when the will was executed. It is certainly sufficient proof that it was in existence before the execution of the codicil; and the cases, including that of Lady Truro, L. R. 1 Prob. & Div. 201, to which I was referred by Mr. Ball, have established that, in considering this question of incorporation, the words of the will which refer to directions must be taken as if brought down to the date of the codicil,—as if repeated in the codicil. It does appear to me that, if the affidavit of Mr. McWry be admissible, the evidence is sufficient to identify the paper of directions signed by the testator as the directions to which he referred in his will. Therefore, if this affidavit is admissible, two of the requisites for incorporation are found in the case before the court, viz., proof of the fact of the existence of the paper when the will was made, and proof of the identity of the paper with that referred to in the will. As to the necessity of these two of the elements mentioned in Jarman there can be no doubt. I may refer to *Singleton v. Tomlinson*, L. R. 3 App. Cas. 404, in the house of lords.

It remains to consider the third circumstance mentioned in the passage I have quoted from Jarman. Does the will refer to or describe this paper of directions as then existing? If it does not, can the court receive any parol evidence on the subject of these directions? As a matter of construction, it is clear that the will does not refer to any document as then in existence. The words are, "as I may direct," "in case I may not have directed." But "may" and "may not" imply that at the time the will was written any directions had not been given or written, and certainly do not suggest that any existed at the time of execution. In *Sunderland's Case*, L. R. 1 Prob. & Div. 198, the words, "as shall be ticketed in papers in my own handwriting," were held in point of construction not to describe as then existing certain papers which did then exist as a matter of fact. If, then, this will does not refer to any papers as then existing, can the court receive parol evidence,—that is to say, as Sir C. Cresswell puts it, (3 Swab. & T. 12,) "to aid in the construction of what the testator has written?" In my opinion, the cases of *Allen v. Maddock*, 11 Moore, P. C. 427; *Van Struhenzee v. Monck*, 3 Swab. & T. 12; and *The Goods of Sunderland*, L. R. 1 Prob. & Div. 198,—establish the law as laid down by Lord PENZANCE at the conclusion of his judgment in the last-mentioned case: "In order to let in parol evidence to ascertain the truth, so far as it can be ascertained by such evidence, with regard to an unexecuted testamentary document, the passage in the

will by which reference is made to it must describe it as a written document then existing." The paper of directions in the present case is not so described, and it must be excluded from probate.

It is ordered by the court that the said Rev. Patrick F. Nolan, one of the execu-

tors in said codicil named, be at liberty to apply for probate of the said will and codicil, dated, respectively, the 13th day of February, 1879, and 20th of July, 1883, without incorporating in such probate the said paper writing dated the 13th of February, 1879, and marked "A."

(See, also, *Phelps v. Robbins*, 40 Conn. 250; In re *O'Hara's Will*, 95 N. Y. 403.)

V. NUNCUPATIVE OR ORAL WILLS.

(8 N. Y. 196.)

HUBBARD v. HUBBARD.

(*Court of Appeals of New York*. March, 1853.)

1. NUNCUPATIVE WILLS—WHO MAY MAKE.

Under 2 Rev. St. N. Y. p. 60, § 22, providing that no nuncupative or unwritten will, bequeathing personal estate, shall be valid, unless made by a soldier while in actual service, or by a mariner while at sea, the wills of soldiers in actual service and of mariners at sea are governed by the principles of the common law.

2. SAME—MARINER AT SEA.

A nuncupative or oral will may be made by the master and owner of a coasting vessel while she is on a voyage, and lying at anchor in an arm of the sea, where the tide ebbs and flows.

3. SAME—FORM OF BEQUEST.

It is sufficient that testator, in prospect of death, in answer to what disposition he wishes to make of his property, states his wishes. No particular form of bequest is necessary, nor is it necessary for him to request any persons present to witness that it is his will.

Appeal from supreme court, second judicial district.

Proceedings before the surrogate of Suffolk county by Maria J. Hubbard to establish an alleged nuncupative will of her deceased husband, William L. Hubbard. William L. Hubbard was master and owner of a coasting schooner of Greenport, Long Island. While on a return trip from Philadelphia with a load of coal, and lying at anchor inside the Delaware breakwater on account of headwinds, he was taken sick with Asiatic cholera, and died the same day. The vessel was anchored in tide-water about a mile from the main-land, the same distance from the open sea, and three miles from the nearest place of settlement on shore. While deceased was suffering from his disease, and about an hour before he died, being of sound mind and memory, he was asked if he had a will, and replied that he had not. He was then asked as to the disposition of his property, and in reply stated, in the presence of the surrounding seamen, that he wished his wife to have all his personal property. Beckwith, his mate, asked him if he wished her to have his real property too, and he replied, "Yes, all." Beckwith then asked him what he should tell his wife, and he replied, "Tell her I loved her to the end." Beckwith again asked him whom he wanted to settle his affairs, and he replied, "I want you to do it." He did not ask any

one to bear witness that what he stated was his will. These conversations being proved by four witnesses, the surrogate adjudged them a good nuncupative will. Elias Hubbard, father of the deceased and his heir at law, appealed to the special term, where the decree of the surrogate admitting the will to probate was reversed. On a further appeal the judgment of the special term was reversed, and Elias Hubbard appealed to this court.

S. D. Craig, for appellant. *G. Miller*, for respondent.

MASON, J. It is provided in this state by statute that no nuncupative or unwritten will, bequeathing personal estate, shall be valid, unless made by a soldier while in actual service, or by a mariner while at sea. 2 Rev. St. p. 60, § 22. As to the wills of soldiers in actual service and mariners at sea, they are left entirely untrammelled by our statutes, and are governed by the principles of the common law. The exception in our statute of wills in favor of soldiers and mariners was taken from the 29 Car. II. c. 3, and is precisely the same and the same exception is retained in England by their new statute of wills. 1 Vict. c. 26, § 11. The testator was a mariner, within the meaning of the statute. The courts have given a very liberal construction to this exception in behalf of mariners, and have held it to include the whole service, applying equally to superior officers, up to the commander in chief, as to common seamen. In re *Goods of Hayes*, 2 Curt. Ecc. 338; 1 Williams, Ex'rs, 97. It has been held to apply to the purser of a man of war, and embraces all seamen in the merchant service. *Morrell v. Morrell*, 1 Hagg. Ecc. 51; In re *Goods of Hayes*, 2 Curt. Ecc. 338; 1 Williams, Ex'rs, 97. This will was made at sea. In legal parlance, waters within the ebb and flow of the tide are considered the sea. *Bouv. Law Dict.* tit. "Sea;" *Ang. Tide-Waters*, 44-49; *Thackarey v. The Farmer*, Gilp. 528; *The Thomas Jefferson*, 10 Wheat. 428; *Baker v. Hoag*, 7 N. Y. 561. Lord Hale says the sea is either that which lies within the body of the county or without it; that an arm or branch of the sea within the "fauces terræ," where a man may reasonably discern between shore and shore, is, or at least may be, within the body of a county, but that part of the sea which lies not within the body of a coun-

ty is called the main sea, or ocean. Harg. Law Tracts, c. 4, p. 10; Smith, Const. § 588. He adds, "That is called an arm of the sea where the sea flows and reflows, and so far only as the sea flows and reflows;" and in this he follows the exact definition given by the Book of Assizes, 22 Id. 93; and this is the doctrine recognized by the courts of this country. *Thackarey v. The Farmer*, Gilp. 524; *U. S. v. Grush*, 5 Mason, 290; *U. S. v. Wiltberger*, 5 Wheat. 76-94; *U. S. v. Robinson*, 4 Mason, 307; *U. S. v. Ross*, 1 Gall. 626.

The courts in England have gone to the utmost verge of construction in extending this exception in behalf of seamen. In a case which came before the prerogative court of Canterbury in 1840, when the deceased was mate of her majesty's ship *Calliope*, and while the vessel was in the harbor of Buenos Ayres, he obtained leave to go on shore, when he met with a serious fall, and was so severely injured that he died on shore a few days after. Immediately after the accident he wrote on a watch bill with a pencil his will, and which was unattested, but which was cut out and certified to by the officers on board the ship, and the court held it a good will of a seaman at sea, and ordered it to probate. *In re Goods of Lay*, 2 Curt. Ecc. 375. The common-law doctrine in regard to nuncupative wills was borrowed from the civil law. *Drummond v. Parish*, 3 Curt. Ecc. 522, 531, et seq. By the civil law, the strict formalities, both in the execution and construction of nuncupative wills of soldiers, were dispensed with; and although they should neither call the legal number of witnesses, nor observe any other solemnity, yet their testament was held good if they were in actual service. *Just. Inst. lib. 2, tit. 11*; 1 Lomax, Ex'rs, 40. The civil law was extremely indulgent in regard to the wills of soldiers. If a soldier wrote anything in bloody letters upon his shield, or in the dust of the field with his sword, it was held a good military testament. 1 Bl. Comm. 417; 1 Lomax, Ex'rs, 40, 41. The common law, however, has not extended this privilege so far as the civil. 1 Bl. Comm. supra. Blackstone says that soldiers in actual military service may make nuncupative wills, and dispose of their goods, wages, and other personal chattels without those forms, solemnity, and expenses which the law requires in other cases.

The rules, however, which are to be observed in making wills by soldiers and mariners, are the same by the common law; and yet it must be confessed that the formalities which are necessary to be observed in the making of wills by soldiers and seamen are not defined with any very satisfactory precision in any of the English elementary treatises upon the subject of wills. Swinburne says that those solemnities only are necessary which are *juris gentium*. Swinb. Wills, pt. 1, § 14. Before the statute the ecclesiastical courts to whose jurisdiction the establishment of personal testaments belonged required no ceremonies in the publication thereof, or the subscription of any witnesses to attest the same. 1 Rob. Wills, 147. A will of personal estate, if written in the testa-

tor's own hand, though it had neither his name nor seal to it, nor witnesses present at its publication, was held effectual, provided the handwriting could be proved. 1 Rob. Wills, 148. And so if written by another person by the testator's directions, and without his signing it, it was held good. Id. 148. It is laid down in books of very high authority that a nuncupative testament may be made, not only by the proper motions of the testator, but also at the interrogation of another. Swinb. Wills, pt. 1, § 12, p. 6; Lomax, Ex'rs, 38; 1 Williams, Ex'rs, 102. And Swinburne says, "As for any precise form of words, none is required, neither is it material whether the testator speak properly or improperly, so that his meaning appears," (2 Swinb. Wills, pt. 4, § 26, p. 643;) and he says, concerning the solemnities of the civil law to be observed in the making of testaments, soldiers are clearly acquitted from the observation thereof, saying that, in the opinion of divers writers, soldiers, when they make their testaments, ought to require the witnesses to be present. 1 Swinb. Wills, pt. 1, § 14, p. 94. It is necessary, however, that the testamentary capacity of the deceased and the *animus testandi* at the time of the alleged nuncupation should be clearly and satisfactorily proved in the case of nuncupative will. 1 Williams, Ex'rs, 102; *Lemann v. Bonsall*, 1 Addams, Ecc. 389, 390.

In the present case the evidence most clearly shows that the deceased was of sound mind and memory, and I think the evidence in the case satisfactorily establishes the *animus testandi* at the time of the alleged nuncupation. He told his mate, Beckwith, to tell his wife that he loved her till the end. He was extremely sick, and undoubtedly apprehending death; and, when asked if he had a will, he replied that he had not; and, on being asked what disposition he wished to make of his property, he said he wished his wife to have all of his personal property, and at the same time requested Beckwith to settle his affairs and see to his business. It should be borne in mind that as well the testator as all of the witnesses present were seamen, and were undoubtedly acquainted with the rights of mariners in regard to making their wills. They evidently understood it to be a will, and spoke of it as such; and I think the *animus testandi* is satisfactorily established. The evidence is quite as strong in the case under consideration as it was in the case of *Parsons v. Parsons*, 2 Greenl. 298, 300, where the testator was asked to whom he wished to give his property, and replied, "To my wife; that is agreed upon;" and the supreme court of Maine sustained the will in that case. I am aware that it is said in some of the books that it is essential to a nuncupative will that an executor be named. But this is no more essential than in a written will. *Rolle*, Abr. 907; *How v. Godfrey*, Finch, 361; *Prince v. Hazleton*, 20 Johns. 522. I am inclined to think, however, that the evidence is sufficient, in the present case, to show that the testator intended to make Beckwith his executor, but it is not necessary that he should have named one.

It is not necessary to decide whether the mariner must make his will in his last sickness and *in extremis*, as was held to be the case under our former statute of wills, (*Prince v. Hazleton*, 20 Johns. 503,) and as is required under the statutes of several of our sister states, (*Boyer v. Frick*, 4 Watts & S. 357; *Baker v. Dodson*, 4 Humph. 342; *Offutt v. Offutt*, 3 B. Mon. 162; *In re Will of Yarnall*, 4 Rawle, 46; *Werkheiser v. Werkheiser*, 6 Watts & S. 184; *Winn v. Bob*, 3 Leigh, 140; *Mason v. Dunman*, 1 Munf. 456; *Portwood v. Hunter*, 6 B. Mon. 538; *Tally v. Butterworth*, 10 Verg. 501; *Parsons v. Parsons*, 2 Greenl.

(See, also, *Van Deuzer v. Estate of Gordon*, 39 Vt. 111; *Scaife v. Emmons*, 84 Ga. 619, 10 S. E. Rep. 1097; *Leathers v. Greenacre*, 53 Me. 561.)

(20 Johns. 502.)

PRINCE, Pub. Administrator, v. HAZLETON
et ux.

(Court of Errors of New York. Nov. 11, 1822.)

1. NUNCUPATIVE WILLS—VALIDITY.

At common law, and under a statute (Laws N. Y. Sess. 36, c. 23, § 14) declaring that a nuncupative will shall not be valid unless "made in the time of the last sickness of the deceased," a nuncupative will is not good unless it be made when testator is *in extremis*, or overtaken by sudden and violent sickness, and has not time to make a written will.

2. SAME.

An alleged nuncupative will offered for probate had all the legal requisites and formalities. The evidence to support it showed that it was made six days before testator's death, while he was declining from a disease of the liver, but under no immediate apprehension of death. Testator was of middle age, had a fair education and habits of business, and had accumulated a fortune, and at the time of his death was boarding in New York city. He had been sick about five weeks, and was attended by a physician and a hired nurse. Another woman, living apart from her husband in such boarding-house, also acted as his nurse. No acquaintance with this woman prior to his sickness was shown, but to her he left his entire property. Held, that the alleged will was not made under such circumstances as to entitle it to probate as a nuncupative will.

Appeal from court of probates.

Application by Benjamin Prince, public administrator in the city of New York, for administration on the estate of William Jones, who died in New York city, April 17, 1820. Mary Hazleton appeared before the surrogate with her husband, George Hazleton, and offered for probate an alleged nuncupative will of Samuel Jones, with the deposition of four witnesses thereto, taken *ex parte* before a commissioner, May 4, 1820, as follows: "The last will and testament of William Jones, late of the city of New York, gentleman, by word of mouth, made and declared by him, on or about the eleventh day of April, last past, in presence of us, the undersigned, Jacob S. Arden, William Lee, George Wateres, and Ellen Taylor, who have herunto subscribed our names as witnesses to such last will and testament: 'I now say, as I have repeatedly said before, that I leave all the property I am possessed of to Mary Hazleton. I do this in consequence of the good treatment and kind attentions I have received from her during my sickness.

298;) for there can be no doubt, upon the evidence in this case, but this will was made both *in extremis*, and in the last sickness, and under circumstances which precluded the making of a written will. I think that the *factum* of this nuncupative will is clearly established by the evidence in the case, and also the testamentary capacity of the deceased, and that the *animus testandi* at the time of the alleged nuncupation is sufficiently apparent from the evidence in the case, and that the judgment of the supreme court should be affirmed.

Judgment affirmed.

She is worthy of it. No other person shall inherit my property. I wish you all in the room to take notice of this.' In witness whereof we have herunto set our hands, this seventeenth day of May, in the year of our Lord one thousand eight hundred and twenty." The surrogate refused to sustain the alleged nuncupative will, under Laws N. Y. Sess. 36, c. 23, § 14, which provided that a nuncupative will shall not be good unless "made in the time of the last sickness of the deceased." Proponents appealed to the court of probate, where the decree of the surrogate was reversed, and the will admitted. Prince appealed to this court.

Hoffman and *T. A. Emmet*, for appellant. *Henry & Van Buren*, for respondents.

KENT, Ch. The question to be discussed is, whether the nuncupative will of William Jones, as stated to have been made on the 11th of April, 1820, can be admitted to probate as being valid in law. It becomes a complicated question, under the circumstances, and involves in the inquiry matter of fact mixed with matter of law. I shall consider it to be my duty to speak frankly and freely on the whole subject of the case, but, at the same time, with a sincere respect for the character of the court whose opinion is now under review, and from which I shall be obliged very greatly to dissent.

William Jones was an Irishman by birth, and a religious Catholic by profession. He was born in the county of Dublin, in Ireland, and received a school education about 30 years before his death, and which carries us back to the year 1790. He had then living parents, brothers and sisters, and he was the youngest of the family. He was apprenticed to a house-carpenter in the city of Dublin, and served a regular apprenticeship of seven years. When this service expired, he worked as a journeyman, for nine or twelve months, and then emigrated to the United States. This brings us, in the history of his life, to year 1798, and perhaps that fact may enable us to give some probable solution of the only circumstance that seems (if we except the will) to cast any shade over the memory of this man. I allude to the change of his paternal name, O'Connor, for that of Jones. It does not appear, precisely,

when he changed his name, but I refer it back to that period as the probable time, and presume that he and his family were more or less implicated in the peril of the rebellion, which broke out in Ireland in 1798, in consequence of an ill-fated attempt to effect a revolution in that kingdom. It is probable that he may have emigrated for safety; and, for greater safety, laid down the name of O'Connor, which was then memorable in the Irish annals, on the side of the unfortunate. But, be this conjecture as it may, we find him first at New York, then for two years at Savannah, then living, for 12 or 14 years, in the island of Cuba, and learning the Spanish language, and where he probably made his fortune. He is next traced, on his return to the United States, to the cities of Baltimore, Philadelphia, and New York; and in all of them he seems to have had business, pecuniary concerns, and friends.

These are the few and imperfect sketches of his biography to be selected from the case, before we find him rich in the fruits of his enterprise, but sick with a disease of the liver, at the boarding-house of Mrs. Fox, in Cherry street, in New York, the latter end of March, 1820. Jones, while at the house of Mrs. Fox, claimed to be worth, altogether, \$65,000, in property existing in New York, Philadelphia, Baltimore, and the island of Cuba; and, to show that this claim had pretty fair pretensions to truth, there was actually found at his lodgings, at his death, bank-books, showing deposits to his credit, in one or more banks of New York, to between thirteen and fourteen thousand dollars. He had been sick at Mrs. Fox's about five weeks, when he is said to have made the will now under consideration. During that time he had one Ellen Taylor, a colored woman, for his hired nurse; and there was a Mrs. Hazleton, who had rooms, and boarded in the same house, who also acted as his nurse. Whether Jones ever saw or heard of Mrs. H. before he came to board at Mrs. Fox's does not appear, nor have we in the case any distinct lineaments of the character which Mrs. H. sustains, or the business or purpose of her life. She rented the two front rooms in the boarding-house, and yet, her brother says, she followed no kind of business. She has had two husbands, and her present one is said to be a seafaring man by one of her witnesses, and another of them says that he had been voyages at sea, and had been on the galio limits, and was then following his trade of a whitesmith at Savannah. Why she lives in this detached situation, without a family of her own, and a husband to live with and provide for her, as is quite common with married persons, must be left to conjecture. She was able, all at once, and, as it would seem, without any adequate cause, and without any remarkable display of goodness, or even of attention, to gain a wonderful ascendancy over the affections of this sick man. If her story be true, and the will genuine, she obliterated from Jones' breast the sense of friendship, the charities of religion, the deep-rooted traces of national affection, every tender recollection of the ties of blood, of his natal soil, of the

school-fellows of his youth, of father and mother, brother and sister, relative and friend. He was persuaded, at one nod, to pour the accumulated treasures of his varied life into the lap of this mysterious woman,—the acquaintance of a day.

The will, as certified by the four witnesses, is in these words: "I now say, as I have repeatedly said before, that I leave all the property I am possessed of to Mary Hazleton. I do this in consequence of the good treatment and kind attentions I have received from her during my sickness. She is worthy of it. No other person shall inherit my property. I wish you all in the room to take notice of this." This will carries marks of fraud on its very face. Let us examine it attentively. This sweeping donation is made for what? For good treatment and kind attentions received from her during his sickness. This sickness had lasted only five weeks, and it was not so bad but that he was able occasionally to ride out. No person apprehended any immediate danger. He had a hired nurse, a colored woman, who was by him totally forgotten. What could this other woman have possibly done, in the course of five weeks, to awaken, in any rational mind, a sense of such enormous obligation, or to call forth such stupendous remuneration? I am forcibly struck with the folly and falsehood of the motive assigned. But the will goes on, and adds, "she is worthy of it." And where does her great merit appear, and from what circumstance does she entitle herself to this extravagant eulogy? The very declaration that she was worthy to possess all his estate proves that Jones must have been insane, or that the whole is a base fabrication. The will goes on further, and says, "No other person shall inherit my property." And why these words of special exclusion of the rest of the world? They seem to imply a heartlessness and misanthropy, very unnatural and very improbable for any man to express in the contemplation of death, and who was in the enjoyment of the comforts and the smiles of fortune; and especially for a native-born Irishman, who was in the midst of his emigrant countrymen, and could not but have heard and felt the claims of religion, of charity, of the widow, and the orphan. He then adds, "I wish you all to take notice of this,"—a speech which looks so much like contrivance that it does, of itself, throw a suspicion over the whole piece. This man must have been previously told that the statute required that, in making a nuncupative will, the testator must bid the persons present to bear witness that such was his will. It was made in the middle of the day, when he was quite comfortable, and far from the apprehension of death, and, in this respect, with all punctilious and technical adherence to forms. It had the requisite number of witnesses and the address to the by-standers. Jones must have deliberately determined on a nuncupative instead of a written will, and have previously known and studied all the circumstances that were requisite to make it valid, or else this will has been since got up for him, like a puppet-show,

by the art and cunning of some juggler behind the scene.

[His honor here went minutely, and at large, into the examination of the testimony in the cause, and particularly of that of the four witnesses to the will, and observed that, from the nature, the improbabilities, the inconsistencies, and the absurdity of the story, and the character and conduct of the witnesses, he drew the conclusion that the testimony of those witnesses was utterly unworthy of credit, and that the will was evidently the production of fraud and perjury. After having disposed of the question of fact, his honor proceeded as follows:]

But if we were to admit, against the truth of the fact, that the will of the 11th of April was actually and fairly made, according to the certificate of the four witnesses, it would then become a question of law whether it amounted to a valid nuncupative will. A "nuncupative will" is defined by Perkins, (Conv. s. § 476.) in his book which was published under Henry VIII., to be properly when the testator "lieth languishing for fear of sudden death, dareth not to stay the writing of his testament, and therefore he prayeth his curate, and others, his neighbors, to bear witness of his last will, and declar-eth by word what his last will is." So, again, in Swinburne, (Wills, p. 32,) whose treatise was published in the time of King James I., it is said that this kind of testament is commonly made when the testator is now very sick, weak, and past all hope of recovery. I do not infer from these passages that unwritten wills were always had at common law, unless made in a case of extremity, when death was just overtaking the testator. In ignorant ages, there was no other way of making a will but by words or signs. Reading was so rare an accomplishment in the earliest ages of the common law that it conferred great privileges, and the person who possessed it was entitled, under the name of benefit of clergy, to an exemption from civil punishment. But these ancient writers mean to be understood that in the ages of Henry VIII., Elizabeth, and James letters had become so generally cultivated, and reading and writing so widely diffused, that nuncupative wills were properly, according to Perkins, and commonly, according to Swinburne, confined to extreme cases, and to be justified only upon the plea of necessity. And this has been the uniform language of the English law-writers from that time down to this day, so that it has become the acknowledged doctrine that a nuncupative will is only to be tolerated when made *in extremis*. Thus in Bacon's Abridgment, which was first published in 1736, and compiled chiefly from materials left by Lord Chancellor Baron GILBERT, a nuncupative will is taken from Perkins, and defined to be when a man is sick, and for fear that death, or want of memory or speech, should surprise him, that he should be prevented, if he stayed the writing of his testament, desires his neighbors and friends to bear witness of his will, and declares the same presently before them. 7 Bac. Abr., by Gwillim, 305. The

same definition is adopted by Wood in his laborious work on Conveyancing, (volume 6, p. 574;) and in Blackstone's Commentaries, (volume 2, pp. 500, 501,) a nuncupative will is defined to be one declared by the testator *in extremis* before a sufficient number of witnesses. After reciting the substance of the provisions of the statute of 29 Car. II., (and which we have re-enacted,) he adds: "Thus has the legislature provided against any frauds in setting up nuncupative wills by so numerous a train of requisites that the thing itself has fallen into disuse, and hardly ever heard of, but in the only instance where favor ought to be shown to it,—when the testator is surprised by sudden and violent sickness." And, while I am citing so many English definitions of nuncupative wills, it cannot be thought useless, and will not be deemed unacceptable, that I should also refer to the very respectable opinion of the late chief justice of Connecticut, who declares, when speaking of nuncupative wills as understood in the English law, that they are allowed only in cases where, in extreme and dangerous sickness, the testator has neither time nor opportunity to make a written will. 1 Swift, Syst. 420.

It appears to me that these various writers must be satisfactory to every one, as to the true sense and meaning of a nuncupative will under the English law. It is not easy to recur to more accurate sources. The probate of wills being in England a matter of ecclesiastical cognizance, cases on that point rarely appear in the reports of decisions in the courts of common law. I have, however, been able to select two or three cases of nuncupative wills, which I shall submit to the consideration of the court.

Cole v. Mordaunt, 4 Ves. 196, note, was the case of a nuncupative will, in the 28th year of Car. II., and it is well worthy of notice that this was only one year before the 29th Car. II., when the statute relating to nuncupative wills was passed, and is said to be the principal case which gave rise to that statute. The case was this: Mr. Cole, at a very advanced age, married a young woman, who, during his life, did not conduct herself with propriety. After his death, she set up a nuncupative will, said to have been made *in extremis*, (for those are the words used in the report of the case,) and by which the whole estate was given to her, in opposition to a written will made three years before, giving 3,000 pounds to charitable uses. The nuncupative will was proved by nine witnesses, but the court of probate rejected the will, and, on appeal to the delegates, a trial was had at the bar of the king's bench, and it appeared that most of the witnesses for the nuncupative will were perjured, and Mrs. Cole herself was guilty of subornation of perjury. It was upon the occasion of this shocking and foul conspiracy that Lord Chancellor NOTTINGHAM said "he hoped to see one day a law that no written will should ever be revoked but by writing." He was gratified in seeing such a law the succeeding year; and I will venture most respectfully to add that, if this nuncupative will be established, I

should also hope to see one day a law that no nuncupative will should be valid in any case. The case I have cited contains a monitory lesson; and it very much resembles, in its principal features, the one before us.

In *Phillips v. Parish of St. Clements'* Danes, 1 Eq. Cas. Abr. 404, pl. 2, which was cited upon the argument, and arose in 1704, one Doctor Shallmer, by will, in writing, gave £200 to the parish, and Prew, a reader in the church, coming to pray with him, he said, he gave £200 more towards building the church, and died on the next day. This was a case of a nuncupative will which only failed for want of three witnesses. But this testator was evidently *in extremis*. The particulars are not stated, except only that an officer of the church came to pray with him, and that he died the succeeding day; but those two circumstances well warrant the inference. There is a very close analogy between these nuncupative wills and a gift upon the death-bed or a *donatio causa mortis*; and these gifts are defined by the court of chancery in *Hedges v. Hedges*, Finch, Prec. 269, Gilb. 12, in the very terms of a proper nuncupative will. A *donatio causa mortis* is where a man lies in extremity, or being surprised by sickness, and not having an opportunity of making his will, but lest he should die before he could make it, gives away personal property with his own hands. If he dies, it operates as a legacy. If he recovers, the property reverts to him.

Upon the strength of so much authority, I feel myself warranted in concluding that a nuncupative will is not good unless it be made by a testator when he is *in extremis*, or overtaken by sudden and violent sickness, and has not time or opportunity to make a written will. The statute of Car. II., so often referred to, and which we have literally adopted, requires a nuncupative will to be made by a testator in his last sickness, and in his own dwelling-house, or where he had been previously resident for 10 days, unless surprised by sickness on a journey, or from home. The last sickness, in the purview of the statute, has been always understood (for so I infer from the cases cited) to apply to the last extremity mentioned in the books; and it never was meant to uphold these wills, made when there was no immediate apprehension of death, and no inability to reduce the will to writing. A case of necessity is the only case, according to Blackstone, in which any favor ought to be shown them. If they are alleged to have been made in a case unaccompanied with necessity, the presumption of fraud attaches to the very allegation. Let us suppose, by way of illustration, the instance of a person gradually declining under the operation of some slow-paced disease, as the affection of the liver, or the consumption of the lungs, or the dropsy, or the cancer. The patient is himself, we will suppose, under no immediate apprehension of death, nor is any such alarm excited in others. He is comfortably seated in his chamber, in the midst of a populous city, and with ample means to command every kind of assistance. He has

had a fair common education, and knows well how to read and write. He has been a man of good understanding, habits of business, and of successful enterprise, and has accumulated a fortune. He is well versed in the knowledge and in the affairs of mankind. He has pen, ink, and paper at hand, with an adroit physician at his elbow, and a favorite friend at his side, on whom he wishes to bestow his fortune. He is in the middle of life, with his intellect perfectly sound. He proposes, or it is proposed to him, to make his will. Would such a man, in such a case, ever dream of making a nuncupative will? Would any honest or discreet friend ever advise him to it? If that should be his wish, or if that should be the suggestion of others, would the law tolerate such an indulgence, under the notion that he was in his last sickness? Surely, the good sense of the law, as the books explain that law, and the cautious and jealous provisions of the statutes of frauds, never intended a nuncupative will for such an occasion. The law wisely discriminates between written and unwritten wills, and permits the latter only in cases of urgent necessity. To abolish that distinction would be to abolish protection to property, to encourage frauds and perjuries, and to throw us back upon the usages of the unlettered ages.

If nuncupative wills can be permitted at all, in the cases of chronic disorders, which make silent and slow, but sure and fatal, approaches, it is only in the very last stage and extremity of them. In no other period can such a disorder be deemed, within any reasonable construction of the statute of frauds, a man's last sickness. Such diseases continue for months, and sometimes for years. In one of Captain Cook's voyages, he states that he lost his first lieutenant, Mr. Hicks, near the conclusion of the voyage of three years, and almost within sight of the English coast. But, he adds, that, as his disease was the consumption, and as it existed when he left England, it might be truly said that he was dying during the whole voyage. What would the law call that man's last sickness? Not the whole voyage, surely, and, probably, it would be narrowed down to the last day, and to the last hour, of his existence. We must give a reasonable interpretation to the statute in reference to the mischief and to the remedy. We cannot safely apply a man's last sickness to the whole continuance of a protracted disease, without giving to the statute an absurd construction. I do, therefore, most confidently insist that Jones was not in this last sickness on the 11th of April, within the sense or within the policy of the statute, and that he was not then entitled to make a nuncupative will.

There is one other consideration that imparts to this subject of nuncupative wills a momentous character, and ought to incline us to give to them as little countenance as possible. As soon as a nuncupative will is made, it becomes the interest of the legatee that the party's sickness should prove to be his last sickness; for, if he recovers, the will, of course, falls to the ground. Not so with a written

will. That remains good until revoked, and it cannot be revoked but by writing. Let us for one moment pause over this consequence of nuncupative wills, and observe with what a deleterious influence they must suddenly act upon the heart, and what a powerful appeal they at once make to the selfish and dark passions of the human mind. The title of the legatee depends altogether upon the precipitate death of the testator. Every day that his life is prolonged more and more impairs the character of the will, and it vanishes if he becomes convalescent. Suppose the testator was understood to possess a large amount of cash in hand, and that he gives it all, by a nuncupative will, to a stranger to whom the law would not have given it. Suppose that stranger to be his physician, or, as in the present case, his nurse, what hold has the testator on her fidelity, her kindness, or her integrity? Her interest and her wishes (if indeed her wishes procured the will) must be to destroy, and not to heal, her benefac-

tor. The legacy operates as a bounty upon his death. One cannot contemplate a nuncupative will under this aspect without sensations of horror. Well might such a man exclaim, as Jones is said to have done, repeatedly, "My life depends upon that woman."

I am accordingly of opinion, both upon the law and upon the fact, that the decree of the court of probate, directing the nuncupative will of William Jones to be admitted to probate, was erroneous, and ought to be reversed; and that the decree of the surrogate of the city and county of New York, of the 17th October, 1820, directing the application to admit the said nuncupative will to probate to be dismissed, and that letters of administration of the goods, chattels, and credits which were of William Jones, deceased, be granted and issued, according to law, as in cases of intestates, be confirmed.

Decree of reversal.

For reversal, 23.

For affirmance, 7.

(See, also, *Carroll v. Bonhan*, [N. J. Prerog. Ct.] 9 Atl. Rep. 371; *In re Will of Meisenbelter*, 15 Phila. 651; *Gould v. Safford's Estate*, 39 Vt. 498; *Vrooman v. Powers*, 47 Ohio St. 191, 24 N. E. Rep. 267. Some cases, however, hold that a nuncupative will made during the testator's last illness is not invalid because he may have had time to reduce it to writing. See *Harrington v. Stees*, 82 Ill. 50.)

VI. EXECUTION OF WILLS.

(81 Mich. 581, 46 N. W. Rep. 106.)

COOK v. WINCHESTER et al.

(*Supreme Court of Michigan*. July 2, 1890.)

1. EXECUTION OF WILLS—ATTESTATION.

If the witnesses to a will sign within the hearing, knowledge, and understanding of testator, and so near as not to be substantially away from him, they are considered to be in his presence.

2. SAME.

How. St. Mich. § 5789, requiring wills to be attested and subscribed by two or more witnesses "in the presence of the testator," is sufficiently complied with if the witnesses sign the will in a room adjoining that in which testatrix is lying, with the door between standing open, and in a line of vision from the bed of testatrix, though it is physically impossible for her to see the act of signing, she being unable to move herself in the bed so as to get within the line of vision, where the witnesses sign at testatrix's request and with her knowledge, and where, after signing, they return to testatrix's room, and inform her that they have signed, and the will is again read to her, and she is shown the witnesses' signatures, and expresses satisfaction.

Case made from circuit court, Kent county; Grove, Judge.

Petition by Ariston J. Cook to admit to probate the alleged will of Alzina Page, deceased. Contested by Laaden Winchester and Clarissa Winchester. Probate was refused by the probate judge, and, on appeal to the circuit court, this action was affirmed. Proponent appealed to this court.

Maher & Felker, for appellant. *Butterfield & Keeney* and *Thompson & Temple*, for respondents.

MORSE, J. This controversy involves the validity of a will, the sole question being whether or not it was duly executed, or rather witnessed, under the laws of this state. There is no question of fraud or undue influence in the case, nor did the testatrix lack mental capacity to execute a will. It must be conceded from all the testimony in the case that the will was drawn by an honest, disinterested, and trustworthy man; that he was the chosen instrument of Mrs. Page to draft it, that she had frequently consulted and advised with him before as to the disposition of her property, and had told him how she intended to bequeath it; that the will as made was just as she wanted it, and as she had long intended to make it; that it was read to her before she signed it and after she signed, at both of which times she expressed herself as fully satisfied with it; that she signed it in the presence of the persons who witnessed it, and that she requested them to witness it; that she asked them after it was executed if they had witnessed it, and received an affirmative answer, and was then shown their signatures, and their names were read over to her. If the will is not sustained, the property will certainly go, under the law, where she did not wish it to go. It is therefore the duty of the courts to uphold it if possible. It is claimed that the requirements of our statute were not complied with in the witnessing of this will. The statute provides (How. St. § 5789) that three things are requisite to the valid-

ity of a will: (1) That it shall be in writing; (2) that it shall be signed by the testator, or by some person in his presence, and by his express direction; (3) that it shall be attested and subscribed, in the presence of the testator, by two or more competent witnesses.

The will was drawn by James Toland, supervisor of the township of Byron, Kent county, who lived only a few rods from Mrs. Page, and with whom she had frequently talked about making her will, and how she wished it drawn. On June 30, 1888, she sent for him. Mrs. Page had been an invalid for many years, and at this time was confined to her bed, and unable to leave it without help. Toland found her in a bedroom adjoining, and opening by a door into, the kitchen,—a kitchen bedroom,—which communicated with no other room. He asked Mrs. Page, who said that she was ready to make her will, and wished him to draw it, if she wanted it drawn in the same manner as she had before told him to draw it. She said, "Yes," and he proceeded. There was no table in the room where Mrs. Page was, and he drew the will on a table in the kitchen. This table was near the bedroom door, but when the door was open it was impossible for any one lying squarely on the bed to see the table or any one sitting at it. Mrs. Page could not move in bed, and was not able to see the table. Toland drew the will, and took it into the bedroom, and read it to Mrs. Page. She was satisfied with the will. Not being able to handle a pen very well, she requested Toland to write her name. He went to the kitchen table and wrote it. He then came in, and she made her mark. Three ladies were present in the room, Mrs. Weaver, Mrs. McConnell, and Mrs. Miller. Mrs. Page requested Mrs. Weaver and Mrs. McConnell to witness the will. Mrs. Weaver did not wish to sign it for some reason, and Mrs. Page then signified that she wished Mrs. Miller to witness it. Mrs. Miller and Mrs. McConnell then stepped into the kitchen and signed the will as witnesses. Mr. Toland and the witnesses then went into the room again, and Toland read the will over to her again, and asked her if it suited her. She said it was all right,—just as she intended it should be. Toland showed the names of the witnesses to her, and also read them to her. He testified that previous to his showing it to her she asked the witnesses if they had signed it, and they told her they had. The door was open between the kitchen and bedroom when the witnessing was done. Mrs. Miller's testimony agrees with Toland, except she says that she stood in the door when the will was being read over after the witnesses had signed it, and did not hear Mrs. Page ask her or Mrs. McConnell if they had signed as witnesses, but heard Toland tell her that they had witnessed the will, and read their names to her. Mrs. McConnell (now Mrs. Merritt) states that when they went back into the bedroom after witnessing the will, and Toland read it all over to Mrs. Page again, she said it was all right, and just as she wanted it; the witnesses and everything were all

right. "She asked me if we had signed it, and I told her we had. Mrs. Miller and Mr. Toland were there." The room in which Mrs. Page was lying was eight feet square. The kitchen was about fifteen feet square. The distance from where the witnesses sat while signing the will to the bed of Mrs. Page was about twelve feet. The will was denied probate by the judge of probate of Kent county, and on appeal to the circuit court his action was affirmed.

It is claimed that the will was not executed—witnessed—in the presence of the testatrix. It is true that it was physically impossible for her to see the witnesses when they were in the act of signing it without moving herself upon the edge of the bed, which she was unable to do. And it is argued by counsel for the contestants that there are no cases to be found in the books, except possibly two, which can be claimed as authority for the admission of the will to probate. That the statute has been uniformly held to require that "the condition and position of the testator when his will is attested, and in reference to the act of signing by the witnesses, and their locality when signing, must be such that he has knowledge of what is going forward, and is mentally observant of the specific act in progress, and, unless he is blind, the signing by the witnesses must occur where the testator, as he is circumstanced, may see them sign if he choose to do so. If in this state of things some change in the testator's posture is requisite to bring the action of the witnesses within the scope of his vision, and such movement is not prevented by his physical infirmity, but is caused by an indisposition or indifference on his part to take visual notice of the proceeding, the act of witnessing is to be considered as done in his presence. If, however, the testator's ability to see the witnesses subscribe is dependent upon his ability to make the requisite movement, then if his ailment so operates upon him as to prevent this movement, and on this account he does not see the witnesses subscribe, the will is not witnessed in his presence." *Aikin v. Weckerly*, 19 Mich. 504, 505. A large number of cases are cited in support of the counsel's claim, to-wit: *Mandeville v. Parker*, 31 N. J. Eq. 242; *Wright v. Manifold*, 1 Maule & S. 294; *Reynolds v. Reynolds*, 1 Speers, 253; *Robinson v. King*, 6 Ga. 539; *Brooks v. Duffell*, 23 Ga. 441; *Reed v. Roberts*, 26 Ga. 294; *Jones v. Tuck*, 3 Jones, (N. C.) 202; *Eccleston v. Petty*, Carth. 79; *Broderick v. Broderick*, 1 P. Wms. 239; *Lamb v. Girtman*, 33 Ga. 289; *Neil v. Neil*, 1 Leigh, 6; *Orndorff v. Hummer*, 12 B. Mon. 626; *In re Downie's Will*, 42 Wis. 66; *Duffie v. Corridon*, 40 Ga. 122; *Edelen v. Hardey's Lessee*, 7 Har. & J. 61; *Russell v. Falls*, 3 Har. & McH. 457; *Graham v. Graham*, 10 Ired. 219; *In re Cox's Will*, 1 Jones, (N. C.) 321; *Ragland v. Huntingdon*, 1 Ired. 561; *Chase v. Kittredge*, 11 Allen, 49; *Compton v. Mitton*, 12 N. J. Law, 71; *Combs v. Jolly*, 3 N. J. Eq. 625; *Mickle v. Matlack*, 17 N. J. Law, 86; *Hindmarsh v. Carlton*, 8 H. L. Cas. 160.

It must be conceded that these cases all fully support the contention that the will

must be witnessed in the same room with the testator, or, if out of the room, where he can see them sign if he desires to do so; he must be in a position where it is possible to see them. The fact that the will, after being witnessed out of the testator's sight, is brought to the view of the testator, and he looks upon the signatures of the witnesses, and they then acknowledge the witnessing of it before him, will not cure this defect in its execution, according to the authority of some of these cases. See *Chase v. Kittredge*, 11 Allen, 61; *In re Cox's Will*, 1 Jones, (N. C.) 321; *Graham v. Graham*, 10 Ired. 219; *Russell v. Falls*, 3 Har. & McH. 457; *Lamb v. Girtman*, 33 Ga. 289; *In re Downie's Will*, 42 Wis. 66.

The extreme rule laid down in some of these cases cited by counsel for contestants, notably *Graham v. Graham*, supra, a North Carolina case, was criticised, and I think justly so, by Justice CHAMPLIN in *Maynard v. Vinton*, 59 Mich., at pages 148, 149, and 26 N. W. Rep., at pages 405, 406, but for the purposes of that case the doctrine of *Aikin v. Weckerly* was adhered to. In *Maynard v. Vinton*, the testatrix was in a position where she might have seen the witnesses sign, as they were within the range of her vision if she saw fit to look, as was also the case with the testator in *Aikin v. Weckerly*. The precise question raised by the record in this case has never been presented to this court, and neither of the two cases above mentioned seems to stand in the way of a just and liberal construction of the statute in this case in favor of the validity of the execution of this will of Alzina Page. I agree with Judge CHAMPLIN that "presence," as used in the statute, has been too narrowly construed by many of the courts as meaning that the witnesses must be under the eye of the testator. I find two cases referred to on the argument where the facts are almost identical with those found by the circuit judge in this case, and in both of which the will was sustained. In the first, (*Sturdivant v. Birchett*, 10 Grat. 67,) the will was attested by the witnesses subscribing their names as such in a different room from that in which the testator was lying at the time of such signing. The testator could not see the witnesses in the act of signing, either from the bed on which he lay or from any other place within the room. The testator signed the will in the presence of the witnesses, and requested them to attest it. They went together into another room for that purpose, it being inconvenient to do so in the room where the testator was lying. When they subscribed their names no other person was in the room, and they immediately returned to the room where the testator was. They were gone from that room not over two minutes. They took the will to the testator, who was lying in bed, and, both of the witnesses being together, one of them said to him, "Mr. Sturdivant, here is your will witnessed;" at the same time pointing with his finger to the names of the witnesses, and holding the will open before him, the names of said witnesses being on the same page, and close

to that of the testator. He took the will in his hands, and looked at it as if he was examining it. He then closed or folded it. On being told that he was ill, and had better give the will to some one to keep for him, he asked whether if he got well he could take it back from the person to whom he might give it. Being answered in the affirmative, he said: "It is my will, and I wish it to stand, but I may hereafter, on getting well, wish to make some slight alteration in it." He then handed the will to a friend. In the other case, of *Riggs v. Riggs*, 135 Mass. 238, (decided June 21, 1883,) the witnesses to the will saw the testator sign it, and were in the room with him at the time. They signed it as witnesses in a room adjoining the one testator was in, and at a distance of about nine feet from him, the door being open. The testator was in bed, and in such a position that if he had been able to turn his head round he might, by so turning it, have seen the witnesses when they signed their names, and also the will itself, unless during a part of the time when their bodies obstructed the view; but from the effect of an injury which he had received he could not in point of fact turn his head sufficiently to see them and the will at the time when they were signing their names as witnesses. After the witnesses had signed the will it was handed to the testator as he was lying upon the bed, and he read their names as signed, and said he was glad that it was done.

These cases differ from the one at bar only in the fact that the will was taken, after witnessing, into the hands of the testator, who in one case looked at it, and in the other read the names, while in *Mrs. Page's* case the names were shown her while the will was in the hands of the scrivener and read to her, as well as the names of the witnesses to it. The difference is unimportant. In all three of the cases the maker of the will knew what he or she was doing, and what was being done, being conscious of all that took place, and no claim of fraud is made or entertainable in any of them. The majority of the Virginia supreme court (three out of five judges) sustained the will in the first case, and held that the statute was substantially complied with, in a very able and exhaustive opinion by Justice LEE. In his opinion the learned justice shows conclusively from the authorities that the words "in presence of" do not necessarily imply that the testator and the witnesses must be in the same room, nor that actual sight or inspection of the process of signing is peremptorily required, because it is well settled that a blind man may make a will. He holds that the recognition by the witnesses of their signatures to the will made within the immediate sight and presence of the testator, immediately after they have signed it in an adjoining room, furnishes as complete a security against the frauds and impositions sought to be guarded against by the statute as the actual manual operation of writing their names by the witnesses under his eye. The identity of the witnesses is also equally assured in both modes. In

the Massachusetts case the court was unanimous in sustaining the will. In referring to the holding by some of the courts that an attestation was insufficient when the testator did not and could not see the witnesses subscribe their names, Chief Justice MORTON, speaking for the court, says: "We are of opinion that so nice and narrow a construction is not required by the letter, and would defeat the spirit, of our statute. * * * The statute does not make the test of the validity of a will to be that the testator must see the witnesses subscribe their names. They must subscribe 'in his presence,' but in cases where he has lost or cannot use his sense of sight, if his mind and hearing are not affected, if he is sensible of what is being done, if the witnesses subscribe in the same room, or in such close proximity as to be within the line of vision of one in his position who could see, and within his hearing, they subscribe in his presence. * * * In a case like the one before us, there is much less liability to deception or imposition than there would be in the case of a blind man, because the testator, by holding the will before his eyes, could determine by sight that the will subscribed by the witnesses was the same will executed by him. * * * The door was open, and the table was within the line of vision of the testator, if he had been able to look, and the witnesses were within his hearing. The testator could hear all that was said, and knew and understood all that was done; and, after the witnesses had signed it, * * * it was handed to the testator, and he read their names as signed, and said he was glad it was done. For the reasons before stated, we are of opinion that this was an attestation in his presence, and was sufficient."

So, in this case, the witnesses were in the line of the testatrix's vision if she could have moved to one side of the bed, which she could not do, as in the Massachusetts case the witnesses were in the range of the testator's vision if he could have turned his head, but he could not. I am better satisfied with the liberal construction of the statute and the reasoning of these two cases than I am with the authorities cited to the opposite, and sustaining the "nice and narrow" interpretation of the statute; and in the case at bar, such holding, as it will in most cases, reaches the justice and

equity of the case, which adds to my satisfaction. No fraud was perpetrated, and none well could have been, under the circumstances of the execution of this will. But in holding the will invalid, a fraud is committed upon the testatrix, as well as her chosen beneficiary, by the law, and her property is disposed of contrary to her wish and intention, to those from whom she sought to keep it away. It is not the purpose or province of the law to do this when it can be avoided. In the definition of the phrase "in the presence of" due regard must be had to the circumstances of each particular case, as it is well settled by all the authorities that the statute does not require absolutely that the witnessing must be done in the actual sight of the testator, nor yet within the same room with him. If, as before shown, they sign within his hearing, knowledge, and understanding, and so near as not to be substantially away from him, they are considered to be in his presence. But we hold that the execution of this will was valid expressly upon the ground that not only was the act of signing by the witnesses within the hearing, knowledge, and understanding of the testatrix, but after such signing the witnesses came back into the room where she was with the will, which was on one sheet of paper; that the will was then again all read over to her by the scrivener, and the names of the witnesses read to her and their signatures shown to her, and she informed by the witnesses, or one of them in the presence of the other, that the will had been signed by them; and that she then said it was all right, "just as she wanted it; witnesses and everything was all right." This seems to us to have been a substantial compliance with the statute, and a witnessing in the presence of the testatrix. The circuit judge returns in his findings of fact that his decision was based entirely on the ground that the will was not properly witnessed under the statute; that, the will not being admitted in evidence for this reason, the case proceeded no further, the proponent taking an exception, and resting. The contestants announced that they were prepared to show that the testatrix was incompetent to make a will. The judgment of the circuit court will be reversed, and a new trial granted. The other justices concurred.

(See, also, *Riggs v. Riggs*, 135 Mass. 238; *Davy v. Smith*, 3 Salk. 395; *Ambre v. Weishaar*, 74 Ill. 109; *Meurer's Will*, 44 Wis. 392.)

(21 Vt. 256.)

ADAMS V. FIELD.

(*Supreme Court of Vermont*. Feb. Term, 1849.)

1. EXECUTION OF WILL—SIGNING BY TESTATOR.

Where a statute does not require, for the proper execution of a will, that it be "signed at the end" or "subscribed" by the testator, but merely that it be "signed" by him, he may write his signature at the beginning of the will, or in any other part; and if this be done for the purpose of giving finality to the will, and no further signing is contemplated, it is sufficient; and, even if a further signing is contemplated, still the testator may subsequently adopt the signature already written as his final signature, and then no further signing will be necessary.

2. SAME.

A will which was wholly in the testator's handwriting, but was written in its different parts at different times, began with the words, "I, Samuel Adams, * * * do hereby make this, my last will and testament." Then followed the clauses disposing of his estate, and at the end was the usual *testimonium* clause, viz., "In testimony whereof I have hereunto set my hand and seal," etc.; but there was no signature after this clause. It appeared, however, that the testator produced the instrument to three subscribing witnesses, and declared it in their presence to be his will, and requested them to witness it as his will, and that they did attest it in his presence, and in the presence of each other. *Held*, that the testator thereby adopted the signature written by him at the beginning of

the will as his final signature, to authenticate and complete the will, and that this was a sufficient signing of the will, under the Vermont statute,¹ the whole subject-matter of the will being at this time in his mind, and the will being completed by one simultaneous act.

3. SAME—ATTESTATION BY WITNESSES.

It is not necessary that the testator sign the will in the presence of the attesting witnesses; if the will be so signed as to satisfy the statute, and the testator declared it to be his will before the witnesses, this is equivalent to signing it before them and is sufficient.

This is an appeal from a decree of the probate court of the district of Fairhaven, which approved and allowed an instrument in writing presented as the last will and testament of Samuel Adams, deceased. It was objected by the appellant (1) that said instrument was not signed by said Samuel Adams, nor by any other person in his presence, and with his express direction; (2) that it was not subscribed by three credible witnesses in the presence of said Samuel Adams and of each other; and (3) that it was not the last will and testament of said Samuel Adams. The instrument commenced: "I, Samuel Adams, of Westhaven, * * * do hereby make this, my last will and testament;" and concluded as follows: "In testimony whereof I have hereunto set my hand and seal, and publish and declare this to be my last will and testament, this 12th day of September, in the year of our Lord eighteen hundred and thirty-seven. Signed, sealed, published, and declared by the said Samuel Adams, as his last will and testament, in presence of us, who have hereunto subscribed our names as witnesses thereof, at the request and in the presence of the testator, and in the presence of each other. [Seal.]" This last clause purported to be signed by three witnesses; but the name of Samuel Adams did not appear in any place upon the instrument, except in the first clause of the will, and in the attesting clause, as aboves shown. The case was tried before a jury, and evidence was received which tended to prove that the will, though written at different times, was wholly in the testator's handwriting, and that it was subscribed by the three attesting witnesses in the presence of the testator and of each other, and at his request, he declaring it at the time to be his will. The judge instructed the jury that the writing by Samuel Adams of his name in the attestation clause was a sufficient and legal signing under the statute of the state; also that it was not necessary that the writing of his name in the beginning of the instrument should have been one simultaneous act with the writing by him of the whole instrument, in order to constitute the same a legal or sufficient signing, nor was it necessary that the whole actor intended instrument

should have been in his contemplation when he so wrote his name; and that, even if the different parts of the instrument were written at different times, yet if the jury should find that the instrument commenced in his name, and was wholly written by him, and that, after it was completed, he produced the same to the three witnesses, and declared it to be his will in their presence, and requested them to witness it as his will, and that they subscribed their names to the instrument in his presence, and in the presence of each other, as witnesses to his last will, the jury should also find that the instrument was sufficiently signed and executed by him as a will. The jury found that the instrument was signed by Samuel Adams, and that it was attested and subscribed agreeably to the statute, and is the last will and testament of said Samuel Adams, deceased. Exceptions by appellant.

L. C. Kellogg and E. N. Briggs, for appellant. R. Pierpoint and I. T. Wright, for appellee.

BENNETT, J. * * * Questions arise under the charge of the court; and the first is, what will satisfy the statutory requirement of signing? Was the name of this testator in the beginning of the will a sufficient signing to satisfy the statute? In the case of *Lemayne v. Stanley*, 3 Lev. 1, the will was in the handwriting of the testator, and such a signing was held sufficient, within the statute of 29 Car. II., which required all wills of land to be signed. In that case, as in this, the will commenced, "I, John Stanley, make," etc. After that decision the law was regarded as settled in England; and the case of *Lemayne v. Stanley* has not only since been followed in that country, but also in our sister states which have, by legislative enactment, adopted the statute of Car. II. The rule was so effectually established that courts of justice, though repeatedly solicited, could not be induced to break in upon it. In England they have found that a statute was necessary to change the law in this particular; and in the reign of the present queen one has been passed requiring a will to be signed at its foot. The same has been done by some of our neighboring states. It was said in England, and the same has been said in the argument of this cause, that the case of *Lemayne v. Stanley* was an evasion of the statute, and opened a door for the perpetration of frauds, and was so nonsensical that it ought not to be followed. If that decision had the effect to open a door for the commission of frauds, this certainly is a cogent reason why it should not have been made in the first place, or since followed. But I am not aware that such has been its effect. Where the whole will is in the handwriting of the testator, and is attested by three witnesses in the presence of the testator, and published by him as his last will, in their presence, it is difficult for me to see how the fact that the signing at the top of the will is held a sufficient signing can open a door to fraud. It must be shown that the will possesses finality before it can be operative; and, to give it this quality, the

¹ The Vermont statute, at the date of this decision, read as follows: "No will, except such nuncupative wills as are hereinafter mentioned, shall be effectual to pass any estate, real or personal, nor to charge or in any way affect the same, unless it be in writing and signed by the testator, or by some person in his presence and by his express direction, and attested and subscribed by three or more credible witnesses, in the presence of the testator and of each other."

testator must, at least, at the final execution of the will, adopt the writing of his name, at the beginning of the will, as a signing, and so intend it. I think in New York they have, or have had, a statute which requires a will to be subscribed by the testator; and this, their courts have said, requires a will to be signed at the foot. This was doubtless according to the etymology of the word "subscribed;" though, if I mistake not, the supreme court of that state held that the introduction of the word "subscribe" in their statute, instead of "sign," should not change the construction from that which had been given to the statute of Car. II.; but the court of errors thought otherwise. The etymology of the word "sign" does not necessarily require the signing to be at the bottom of the instrument, and it is much a matter of taste as to the place of signing. If the question were *res integra*, we might think the bottom of the will was the place where the statute intended it should be signed by the testator; but to me it seems rather immaterial in which place the will is signed, provided it is shown to have the necessary authenticity. The law, as established in the case of Stanley's Will, has become a rule of property, and *stare decisis* seems wisest to me. When our statute of wills was enacted, the statute of Car. II. had received a long, fixed, and well-known construction; and when we adopt an English statute we take it with the construction which it had received, and this upon the ground that such was the implied intention of the legislature. We think the case of Lemayne v. Stanley should be binding upon this court. To impugn or overthrow it would be to impugn or overthrow a rule of property which has long been settled and acted upon. This should never be done unless upon the most urgent necessity. The case of Lemayne v. Stanley does not stand alone. In Knight v. Crockford, 1 Esp 190, it was held that where a writing began, "I, A. B., agree," etc., it was a sufficient signing, within the statute of frauds; and there are other cases to the like effect, which, in principle, are like the case of Lemayne v. Stanley. See 1 Jarm. Wills, 70.

The counsel for the appellant seem constrained to admit, in substance, that the signing of a will at the beginning may, if so designed, be a sufficient signing, within the statute of Car. II.; but they insist that, in the case before us, the testator intended to sign this will at the foot, and that consequently the will was incomplete and wanting in finality until it was so signed. I think it is hardly possible not to see that, at the time the testator inserted his name at the beginning of the will, a further signing of it was in contemplation before it should have authenticity; and if the jury have not, by their verdict, found the will to be complete and finished at the time of its publication, it should not have been established. In the treatise Modern Probate of Wills (page 154) the writer says: "Although the testator may have commenced his will thus, 'I, A. B., make,' etc., with an intent of repeating his signature at the end of the will, yet if he subsequently acknowledge

the instrument as his will to the attesting witnesses, without allusion to the signature, we presume that the will was sufficiently signed." In 1 Jarman on Wills (page 70) it is said: "If the testator contemplated a further signature, which he never made, the will must be regarded as unsigned;" and so, doubtless, are the authorities, as well as the reason of the thing. But he well remarks that the reasoning seems only to apply where the intention of repeating the signature remained unchanged to the last; for a name, originally written with such design, might afterwards be adopted by a testator as the final signature; and such, the writer says, "would probably be the presumed intention, if the testator acknowledged the instrument as his will to the attesting witnesses, without alluding to any further act of signing." We think this is a sound view of the subject. If the will, as the jury must have found in this case, was attested by three witnesses in the presence of the testator, and in presence of one another, and published by the testator in their presence as his last will and testament, it was to all intents and purposes an adoption of such a signature as was then affixed to the will; and if the will then had such a signature as could be held sufficient under the statute, nothing further need be done. The will then becomes complete, and possesses all the finality which can be required. It is the same thing, in effect, as if the signature had been originally made *animo signandi*. The case of Hubert v. Treherne, 42 E. C. L. 288, is regarded by the appellant's counsel as a leading case to show that this will was incomplete. The names of the parties to the agreement were stated in the beginning of the articles; and it concluded, "as witness our hands," but no signatures followed. The court, it is true, held that this agreement was not signed, within the statute of frauds, for the reason that the words, "as witness our hands," imported that a further signing was intended. I fully accord with this decision; but it should be remembered that there was nothing in that case to show an adoption of the signatures in the commencement of the articles as the final signatures. TINDAL, C. J., says: "There was no sufficient original signing, and no subsequent recognition." COLTMAN, J., remarks that "there was no sufficient authority to give out the copy in behalf of the party to be charged with the agreement;" and ERSKINE, J., says he is "not prepared to say that, if the articles had been delivered by any proper authority, the signing would not have been sufficient." Had the case shown a subsequent recognition of the articles, I can have but little doubt the decision would have been different. The cases of Saunderson v. Jackson, 2 Bos. & P. 238, and Schneider v. Norris, 2 Maule & S. 286, rest upon the ground of a subsequent recognition. Though the case of Johnson v. Dodgson, 2 Mees. & W. 659, is much relied upon by the appellant, yet it recognizes all the principles necessary to sustain the charge of the county court. Lord ABINGER remarks that the cases have de-

ried that, although the signing be in the beginning or middle of the instrument, yet it is as binding as if it were at the foot; the question being always open to the jury whether the party, not having signed it regularly at the foot, meant to be bound by it as it stood, or whether it was left so unsigned because he refused to complete it. This principle we apply to the case before us. The jury have found that the testator produced the will in question to the witnesses, and declared it to be his will, and requested them to witness it as his will. This shows that the testator did not then contemplate a further signing of the will, and is, in effect, a finding by the jury that the testator adopted the instrument as it was then signed as his will; and, if so, then the signing was sufficient to satisfy the claims of the statute. It might, perhaps, have been urged with some propriety that, though this will contains the usual *ad testimonium* clause yet that, upon its face, it furnishes no evidence from that circumstance that a further signing was intended at the time the testator drew up his will. This clause is written on the original will, it appears, so close to the seal that there is no room for his signature opposite to the seal, or very near to it; but, as the case was not put to the jury upon any such ground, it is not necessary to consider it. The case is right, going upon the ground that the *ad testimonium* clause to this will furnished evidence *prima facie* that at the time it was written a further signing was in the mind of the testator. The case of *Waller v. Waller*, 1 Grat. 454, has been pressed upon us; but we cannot accede to the doctrine of that case. It is there said that the finality of the testamentary intent must be ascertained from the face of the paper, and that, to constitute a sufficient signing under their statute, it must appear from the frame of the instrument, and upon its face, that the signing was intended to give it authenticity as a signature, and that it was complete without any further signature, and that the paper itself must show all this. We think that unless there is something peculiar in the statute of that state, this case is unsound, and stands opposed to the whole current of decision under the statute of Car. II. The case of *Sarah Miles' Will*, 4 Dana, 1, which the appellant has referred the court to, contains the sound doctrine on this subject. Her will was drawn by a neighbor, at her request, and under her dictation, and commenced thus, "In the name of God, I, Sarah Miles," etc., and concluded with the usual *ad testimonium* clause. It was read to and approved by her, but not then signed or attested. After this she acknowledged the paper as her will, in the presence of the witnesses who attested it in her presence and at her request; she being at that time unable to write. The principle adopted by the court was that though her name in the beginning of her will was not intended, when written, to be her signature, yet, as it was so designed at the time of the publication, and there was then no intention on her part further to sign her will, it was a sufficient signing

within their statute, which was a copy of the English statute. This is in accordance with the English cases.

It has been argued that the writing of the testator's name in the beginning of the will could not be an act recognizing the whole substance of the instrument, unless the whole *factum* was simultaneous with it, and was also in the contemplation of the testator at the time he wrote his name. It may be true that when the signing of the name in the beginning of the will is, in and of itself, to be taken as a signing of the will within the statute, without any subsequent recognition, it must appear that the testator had the whole object of the instrument in prospect when he wrote his name, and that the instrument must be completed by one simultaneous act; yet, suppose it to be so, it cannot apply to a case like this. Here the signature did not become a sufficient signature, within the statute, until it was adopted as such at the time of the publication of the will; and then the whole subject-matter of the will was in the mind of the testator, and the will was completed by one simultaneous act. Since the cases of *Ellis v. Smith*, 1 Ves. Jr. 11, and *Carleton v. Griffin*, 1 Burrows, 549, the law has been settled that the testator need not in fact sign the will in the presence of the attesting witnesses; and it is there held, if the will be so signed that it can in any event satisfy the statute, and the testator declare it to be his will before three witnesses, that this is equivalent to signing it before them, and satisfies the statute. This case has been very fully examined by the counsel, and every consideration has been urged that could bear upon the question before us; and we may well admire the learning and ability which have been displayed in the argument, yet we do not feel at liberty to depart from well-established landmarks. The statute of Car. II. had received a settled construction when our statute was passed, and we must regard that construction as binding upon us. If we should change a rule of property, because we might think that the more obvious and popular meaning of the word "sign" might import a signing of the instrument only at its foot, we should, in my opinion, be far from duty.

The result is, the judgment of the county court is affirmed.

(91 N. Y. 516.)

In re O'NEIL'S WILL.

(*Court of Appeals of New York.* March 6, 1883.)

1. EXECUTION OF WILLS—AUTHENTICATION NOT AT END OF WILL.

While the primary rule governing the interpretation and construction of wills admitted to probate recognizes and endeavors to carry out the intention of the testator as expressed in the will, yet, in the construction of the statute regulating their execution, the court considers the intention of the legislature, rather than that of the testator.

2. SAME.

A will was drawn upon a printed blank consisting of four pages, the formal commencement being printed upon the first page, and the formal termination printed at the end of the third page.

The intervening blank space was filled in in writing, and, as it did not afford sufficient room, a part of one of the material provisions was carried over to the top of the fourth page, and occupied one-third thereof, at the top, the page being left blank below it. The names of the testator and of the subscribing witnesses were written at the bottom of the third page, below the formal termination of the will; but the matter written on the fourth page was not authenticated in any way, nor connected with the unfinished article on the third page by any word or symbol. Held not a subscription at the "end of the will," as required by 2 Rev. St. N. Y. p. 63, § 40;¹ and that the portion preceding the signatures could not be admitted to probate, but that the will, so far as execution was concerned must be deemed valid or invalid as a whole. *Tonnele v. Hall*, 4 N. Y. 140, distinguished.

Appeal from supreme court, general term, third department.

Proceedings before the surrogate of Essex county for the probate of an instrument purporting to be the will of James O'Neil, deceased. The will was drawn upon a printed blank of four pages, with a printed heading and formal commencement at the top of the first page, and a printed formal termination at the foot of the third page, where the testator and the witnesses signed. The intervening blank spaces on the first, second, and third pages were filled with the peculiar provisions of the will, but, being insufficient for all of the writing, about two-thirds of the last written article was carried over to the fourth page. Such article was as follows: "(13) And I authorize and empower my executors hereinafter named to sell, convey, assign, and transfer my real property for the bequests hereinbefore named and mentioned, either at private—[Here followed, at the end of the third page, the appointment of executors, the signature of the testator, the attestation clause and signatures of subscribing witnesses, and then at the top of the fourth page appeared the following paragraph:]—Or public sale, and in the manner which they will deem the most profitable and advantageous to my said estate; but in no case shall my said executors be process by law or otherwise to sell and convey and dispose of my said real property before the lapse of five years after my death, unless my said executors shall see fit and proper to sell and dispose of the same by virtue of the power and authority hereinbefore given them as aforesaid." The will so drawn was read to testator, the portion written at the top of the fourth page being read as if written in the blank space preceding the printed matter on the third page. The surrogate

admitted the will to probate, and contestants appealed to the general term where the decree of the surrogate was reversed. Proponents appealed to this court.

Matthew Hale, for appellants. *Samuel Hand*, for respondents.

RUGER, C. J. The matter in controversy arises between some of the heirs at law and the executors over the alleged improper execution of what purports to be the will of James O'Neil. The instrument was drawn upon a printed blank, consisting of four pages, the formal commencement being printed on the first page, and the formal termination, also printed, appearing at the foot of the third page; and the intermediate space being originally left blank for the insertion of such special provisions as the testator might desire to make. When presented for probate, the entire blank space was filled in, and, it being apparently insufficient in extent to contain all of the provisions sought to be introduced into the will, the thirteenth seems to have been carried over and finished on the first eight or ten lines of the fourth page. That portion of the will seems in no way to be authenticated, and leaves a blank space of two-thirds of a page below the written lines. The names of the testator and of the witnesses were subscribed towards the bottom of the third page, below the formal printed termination of the will, and there only. The portion of the thirteenth paragraph, immediately preceding the printed termination, was manifestly incomplete, and the lines written on the fourth page were obviously a continuation of this broken paragraph. The two portions were not, however, sought to be connected by means of a reference, an asterisk, words, or symbol, indicating the relation to each other. Material provisions are contained in the writing on the fourth page. Upon this state of facts, the question is raised that this is not such a subscription and signing by the testator and witnesses, at the "end of the will," as is required by our statute. 2 Rev. St. p. 63, § 40.

The application of some of the elementary principles governing the interpreting of statutes would seem to furnish a safe and certain guide for the determination of the question presented. The words of the statute must be construed in their plain, obvious sense, according to their signification among the people to whom they were directed. *Ogden v. Saunders*, 12 Wheat. 312; *Story, Const.* § 449. Also that construction must be adopted which will effectuate, as far as possible, the intent of the framers of the statute, and obviate the anticipated evils which were the occasion thereof. *Tonnele v. Hall*, 4 N. Y. 140. The legislative intent was doubtless to guard against frauds and uncertainty in the testamentary disposition of property, by prescribing fixed and certain rules by which to determine the validity of all instruments purporting to be wills of deceased persons. Reviser's notes, *Willis v. Lowe*, 5 Notes Cas. Adm. & Ecc. 428. The question, then, arises whether the "end of the will" referred to in the statute means the actual

¹ The statute of New York requires a will either of real or personal property, or both, to be executed and attested in the following manner: (1) It shall be subscribed by the testator at the end of the will. (2) Such subscription shall be made by the testator in the presence of each of the attesting witnesses, or shall be acknowledged by him to have been so made to each of the attesting witnesses. (3) The testator, at the time of making such subscription, or at the time of acknowledging the same, shall declare the instrument so subscribed to be his last will and testament. (4) There shall be two attesting witnesses, each of whom shall sign his name as a witness at the end of the will, at the request of the testator. 2 Rev. St. p. 63, § 40.

physical termination of the instrument, or that portion thereof which the testator intended to be the end of the will. While it is possible that, in isolated cases, the latter construction might sometimes preclude the perpetration of a wrong, it certainly would not satisfy the general object of the statute of furnishing a certain fixed and definite rule applicable to all cases. While the primary rule governing the interpretation of wills, when admitted to probate, recognizes and endeavors to carry out the intention of the testator, that rule cannot be invoked in the construction of the statute regulating their execution. In the latter case courts do not consider the intention of the testator, but that of the legislature.

In considering the question stated upon authority, some cases are found which apparently sustain the contention of appellant's counsel. In all of them, however, there was a failure to observe the rules of construction which we consider controlling. We think, however, that the weight of authority favors the theory that the statute fixes an inflexible rule by which to determine the proper execution of all testamentary instruments. The cases cited from the English Reports, except certain ones hereinafter referred to, do not afford much assistance in construing our statute, from the fact that they cover a period during which material changes were wrought in their statutes, and the further fact that those statutes differ in material respects from our own.

The statutes of 15 & 16 Vict. c. 24, among other things, provided that no signature "shall be operative to give effect to any disposition or direction which is underneath, or which follows it, nor shall it give effect to any disposition or direction inserted after the signature shall be made." From this alone might be deduced arguments sufficient to dispose of the question involved in this case, if our statutes contained similar provisions.

As early as 1847, Sir JENNER FUST, in the case of *Willis v. Lowe*, supra, says: "Cases have occurred before the real purpose of the act had been ascertained, in which the court has given construction to the statute, as far as possible, to fulfill the real intention of the parties; but the court is under the necessity of looking at the clear intention of the act. The court was of the opinion, at first, that the intention of this part of the act was to remove the difficulty which had arisen under the statute of frauds, by the construction of which the signature at the commencement of a will was equally good with the signature at its end. But there was another reason for the provision, viz., to guard against fraud. The act required the signature to be at the foot or end of the will, to prevent any addition to the will being made after its execution in presence of witnesses." In *Dallow's Case*, L. R., 1 Prob. & Div. 189, immediately following the signatures of the testator and the witnesses was the clause, "My executors are," A., B., and C. The will contained clauses in the body referring to the executors as "hereinafter named," but they were named in no other place except after the signature. It was

held that the clause naming the executors could not be admitted to probate, Sir J. P. WILDE saying: "The question is whether, under St. Leonard's act, (15 & 16 Vict.,) the clause appointing executors can be admitted to probate. Although parol evidence may show that the clause appointing executors was written before the signature, it is not made manifest by any words in the will of the testator so describing that clause when he referred 'to my executors hereinafter named.' And parol evidence cannot be received for that purpose; and it seems to me, also, that it would be directly contrary to the statute, which requires the will to be signed at the foot or end, to permit probate of this clause." In *Sweetland v. Sweetland*, 4 Swab. & T. 6, Sir J. P. WILDE says: "I have no doubt the testator did intend to execute in proper form the will; the question is whether he has done so." In *Hays v. Harden*, 6 Pa. St. 409, GIBSON, C. J., says: "Signing at the end of the will was required to prevent evasion of its provisions." In *Glancy v. Glancy*, 17 Ohio St. 134, DAY, C. J., says: "The testator is required by this portion of the statute to sign his will at the end thereof. The reason of this requisition is obviously to prevent improper alterations of a will." The provision is a judicious one, and care should be taken not to break in upon it by a lax interpretation.

We think this question has been substantially determined in this court in the case of *Sisters of Charity v. Kelly*, 67 N. Y. 409. FOLGER, J., says: "Can we say that the end of the will has been found until the last word of all the provisions of it has been reached? To say that where the name is, there is the end of the will, is not to observe the statute. That requires that where the end of the will is, there shall be the name. It is to make a new law to say that where we find the name, there is the end of the will. The statutory provision requiring the subscription of the name to be at the end is a wholesome one, and was adopted to remedy real or threatened evils. It should not be frittered away by exceptions."

It will be seen, in all of the cases cited, there was no reason to doubt the testator's intention to make a valid disposition of his property; and yet in each case the will was denied probate, because in the execution thereof the testator did not conform to the provisions of the statute, in failing to place his signature at the physical end of the will.

It is claimed by the counsel for appellant that the clause in question may be regarded as an interlineation, and thus held to be constructively a part of the body of the will. We think that this claim cannot be supported without opening the door to all of the evils which the statute was intended to prevent, and substantially abrogating its wholesome provisions. The same argument would validate the addition of a fourteenth paragraph to the unauthenticated lines appearing on the fourth page, and lead, by logical deduction, to indefinite extension.

It is said, also, that the cases holding that a paper or document referred to in the body of a will may be considered as

a part thereof, afford support to the construction claimed by appellant's counsel. It is not believed that any paper or document containing testamentary provisions not authenticated according to the provisions of our statute of wills has yet been held to be a part of a valid testamentary disposition of property, simply because it was referred to in the body of the will. It was held in *Tonnele v. Hall*, 4 N. Y. 140, that a map appearing after the signature upon a will, and said to be a reduced copy of a map made by the testator of his real estate and filed in the county clerk's office of New York, and which was referred to in the body of the will, did not require the signature of the testator and witnesses to follow it in order to make it a part of the will. It is to be observed that the paper there in question was referred to merely to identify the subject devised, and contained no testamentary provisions. It is further to be observed that the will in the case cited was complete without such additions, and that the maps could probably have been used as evidence to identify the property devised, even if no reference had been made thereto in the will. Independent of authority, the argument, upon principle, leads inevitably to the conclusion that the will was improperly executed. The signatures to it are confessedly between the various operative and disposing parts of the instrument, and in no sense at the literal or physical end of the will. That the signatures are where the testator intended the will should end, we have already seen, is not a material circumstance. A blank space covering two-thirds of a page of foolscap paper is left immediately after the language we are in-

vited to insert in the will, and no possible guard is provided against the addition thereto of any such provision as the person in possession of this paper may be tempted to make. There can be no answer to the proposition that to uphold this will is to defeat the object of the statute in requiring a will to be subscribed at the end. The opportunity of adding indefinitely to a testamentary provision will be legalized by so holding, and the statute, instead of establishing an inflexible rule by which to determine the proper execution of a will, will be open to as many different constructions as varying circumstances may invite.

We thus arrive at the conclusion that the will in question was not properly executed, and it cannot, therefore, be admitted to probate. The claim that such parts of the will as precede the signatures may be received, and the remainder rejected, cannot be supported. The statute denies probate to a will not executed in accordance with its provisions. It is either valid or invalid, as an entirety, as far as its execution is concerned. It is undeniable that the portion following the testator's signature contains material provisions, and formed part of his scheme in making a will. At all events, we have no way of determining the extent to which he deemed them material, and cannot give effect to one part, and deny force to another. This point was decided adversely to the appellant in *Sisters of Charity v. Kelly* and other cases above cited. The judgment should be affirmed.

All concur, except RAPALLO, J., not voting.

Judgment affirmed.

(See, also, *Younger v. Duffie*, 94 N. Y. 535; *In re Will of Hewitt*, 91 N. Y. 261; *In re Goods of Hughes*, 12 Prob. Div. 107; *Hallowell v. Hallowell*, 88 Ind. 251; *Long v. Zook*, 13 Pa. St. 400; *In re Conway's Will*, [N. Y. App. March 1891,] 26 N. E. Rep. 1028.)

(110 N. Y. 611, 18 N. E. Rep. 433.)

In re MACKAY'S WILL.

(*Court of Appeals of New York*. Oct. 26, 1888.)

1. EXECUTION OF WILLS—ATTESTATION—FAILURE TO SEE SIGNATURE.

The attesting witnesses must see the testator's signature at the time of the attestation, and it is not sufficient that at his request they sign an attestation clause to a will so folded that they can neither see whether it is signed or sealed, although he tells them that it is his will, and that it is ready for their signatures. *Dictum* in *Willis v. Mott*, 36 N. Y. 486, 491, overruled.

2. SAME.

The witnesses should either see the testator subscribe his name, or he should, the signature being visible to him and to them, acknowledge it to be his signature.

44 Hun, 571, affirmed.

Appeal from supreme court, general term, third department.

Application to surrogate's court of St. Lawrence county to probate the will of James Mackay, deceased. From a decree refusing probate the executors and legatees appealed to the general term, where the surrogate's decree was affirmed, and they appeal to the court of appeals. For opinion of the general term, see 44 Hun, 571.

Louis Hasbrouck, for appellants. *Wm. H. Sawyer*, for respondent.

EARL, J. The subscribing witnesses came to the dwelling-house of the deceased by previous appointment, and, while seated at his writing-desk, he said to them: "Gentlemen, what I sent for you for was to sign my last will and testament." Thereupon he took from his writing-desk the instrument offered for probate, and, laying it before the witnesses, said: "It is now all ready, awaiting your signatures." He then presented the instrument to the witness McCarrier for his signature, and he signed it, saying, as he did so, "I am glad, Father Mackay, you are making your will at this time; I don't suppose it will shorten your life any," to which he replied, "Yes, he wanted it done, and off his mind;" and then the witness Mulligan, who had joined in this conversation, signed the instrument, as a witness. At the time of exhibiting the instrument to the subscribing witnesses he told them it was his will; but he handed it to them so folded that they could see no part of the writing, except the attestation clause, and they did not see either his signature or seal.

There would undoubtedly have been a formal execution of the will, in compliance with the statutes, if the witnesses had at the time seen the signature of the testator to the will. Subscribing witnesses to a will are required by law, for the purpose of attesting and identifying the signature of the testator, and that they cannot do unless at the time of the attestation they see it. And so it has been held in this court. In *Lewis v. Lewis*, 11 N. Y. 221, where the alleged will was not subscribed by the testator in the presence of the witnesses, and when they signed their names to it it was so folded that they could not see whether it was signed by him or not, and the only acknowledgment or declaration made by him to them, or in their presence, as to the instrument, was, "I declare the within to be my will and deed," it was held that this was not a sufficient acknowledgment of his subscription to the witnesses within the statute. In that case *Allen, J.*, writing the opinion, said: "A signature neither seen, identified, nor in any manner referred to as a separate and distinct thing, cannot in any just sense be said to be acknowledged by a reference to the entire instrument by name to which the signature may or not be at the time subscribed." In *Mitchell v. Mitchell*, 16 Hun, 97, affirmed in this court in 77 N. Y. 596, the deceased came into a store where two persons were, and produced a paper, and said: "I have a paper which I want you to sign." One of the persons took the paper, and saw what it was and the signature of the deceased. The testator then said: "This is my will; I want you to witness it." Both of the persons there-

upon signed the paper as witnesses, under the attestation clause. The deceased then took the paper, and said, "I declare this to be my last will and testament," and delivered it to one of the witnesses for safe-keeping. At the time when this took place the paper had the name of the deceased at the end thereof. It was held that the will was not properly executed, for the reason that one of the witnesses did not see the testator's signature, and as to that witness there was not a sufficient acknowledgment of the signature or a proper attestation. It is true that in *Willis v. Mott*, 36 N. Y. 486, 491, *Davies, C. J.*, writing the opinion of the court, said that "the statute does not require that the testator shall exhibit his subscription to the will at the time he makes the acknowledgment. It would therefore follow that when the subscription is acknowledged to an attesting witness it is not essential that the signature be exhibited to the witness." This is a mere *dictum*, unnecessary to the decision in that case, and therefore cannot have weight as authority. The formalities prescribed by the statute are safeguards thrown around the testator to prevent fraud and imposition. To this end the witnesses should either see the testator subscribe his name, or he should, the signature being visible to him and to them, acknowledge it to be his signature. Otherwise imposition might be possible, and sometimes the purpose of the statute might be frustrated. We think, therefore, that probate of the will was properly refused, and that the judgment below should be affirmed, without costs. All concur.

(See, also, *Daintree v. Butcher*, 13 Prob. Div. 102; *Jackson v. Jackson*, 39 N. Y. 153; *Lewis v. Lewis*, 11 N. Y. 220; *Peek v. Cary*, 27 N. Y. 9.)

VII. REVOCATION, REPUBLICATION, AND REVIVAL OF WILLS.

(118 N. Y. 191, 21 N. E. Rep. 77.)

NEWCOMB v. WEBSTER et al.

(*Court of Appeals of New York*. April 16, 1889.)

1. REVOCATION OF WILLS—MAKING CODICIL.

A will and a codicil are to be construed together as parts of one and the same instrument; so far as their provisions are inconsistent or repugnant, those in the will are revoked by those in the codicil. A codicil, after expressly revoking so much of the will as was inconsistent therewith, made a new and complete disposition of all the testator's property, wholly inconsistent with the disposition made by the will, but did not appoint any executors. *Held*, that the will was entirely revoked, except as to the appointment of executors.

2. PROBATE—TWO INSTRUMENTS.

In such a case, both instruments should be admitted to probate, as the appointment of executors by the will holds good, although the estate is to be administered according to the provisions of the codicil.

Appeal from a judgment of the general term, fifth department, of the supreme

court, affirming a judgment of Monroe county special term, upon trial by the court without a jury. There was no dispute about the facts. It appeared that Angeline B. Walker died on the 7th of June, 1884, leaving real and personal property in Monroe county; that by her will, dated April 23, 1881, she, by its first clause, gave to her sister Olive, for life, house No. 89 Frank street; remainder to Mrs. A. B. Johnson, Mary A. Hatch, and Milcent J. Johnson. By the second clause, to Anna Newcomb, for life, house and lot No. 14 Spencer street; remainder to the surviving children of Anna. *Third*. She directed house No. 89½ Frank street to be sold, and its proceeds applied in part to the erection of a monument on "my lot in Mt. Hope;" \$100 to the Mt. Hope commissioners to keep the same and lot in order; and the residue to Emeline Super, William Springstead, Huber Herrick, Nelly Super, Frances Spencely, and Elliot Hodges, of

Rochester, N. Y., share and share alike, after first paying \$100 each to Mrs. Rose Chriction, of Rochester, N. Y., and to Charles P. Hodges, of Cleveland, Ohio, which "I bequeath to them." The legacy of William Springstead to be deposited in the Monroe County Savings Bank, and paid over, with its accumulations, when he arrives at 21 years of age. *Fourth.* Directs No. 102 Jones street to be sold, and proceeds to be divided between the six children of George Walker. *Fifth.* She gives her piano to Robert P. Newcomb, son of Anna L. Newcomb; and all her household furniture and household goods and effects to her nieces, Mrs. Adelia Johnson, Mary Hatch, Anna Newcomb, Ida Springstead, of Rochester, and Minerva Herrick, of Watertown, N. Y., and also all residuary interests and estate; and finally appoints Aaron N. Newcomb and Edward Webster executors of the will, with power to sell and convey real estate. It further appeared that in the year 1882 she sold lot 14, referred to in the second clause of the will, and also sold 102 Jones street, referred to in the fourth clause. Afterwards, in 1884, she executed an instrument in these words: "I, Angelina B. Walker, of the city of Rochester, county of Monroe, and state of New York, do make, publish, and declare this first codicil to my last will and testament, hereby revoking so much of my said last will and testament as is inconsistent with the provisions of this codicil: *Item First.* I direct one hundred dollars to be set aside and paid over to the commissioners of Mount Hope as a perpetual fund, the interest of which shall be annually expended to keep the lot in said Mount Hope belonging to my late husband, Robert Walker, and my brother, Perry Hodges. *Second.* I give and bequeath to the Rochester Home for the Friendless one hundred and fifty dollars. *Third.* I give and bequeath to the Frank Street (otherwise Sixth) Methodist Episcopal Church of Rochester, to be expended by the trustees thereof towards erecting a parsonage for the use of their pastor, the sum of five hundred (500) dollars. *Fourth.* I give and bequeath to the Rochester Orphan Asylum three hundred dollars, to be expended for the rearing and education of an orphan, Belle Peer by name. *Fifth.* I give and bequeath to Hubert Herrick, of Rochester, five hundred dollars, to be placed on interest in the Monroe County Savings Bank, paid over to him on arriving at twenty-one years of age. If he shall die before that date, then said legacy shall go to his mother, Minerva Herrick. *Sixth.* I give and bequeath to my sisters, Emeline Soper and Olive J. Hatch, each the sum of five hundred (500) dollars. *Seventh.* I give and bequeath to the six (6) children of my brother-in-law, George Walker, each the sum of two hundred (200) dollars. *Eighth.* I give and bequeath to my four nieces, Mrs. Anna Newcomb, Frances Spencely, (of Canada,) Adelia B. Johnson, and Mary N. Hatch, all the rest, residue, and remainder of my estate, both real and personal, to be divided equally between them, and share and share alike." The trial judge found "that no part of said

will is revoked by said codicil, except the second and fourth clauses thereof, and the residuary devise in the fifth clause of said will, but that all other legacies and devises in said will and codicil ought to be carried into effect."

D. C. Barnum, for appellants. *Roy C. Webster*, for respondents.

DANFORTH, J., (after stating the facts as above.) Both will and codicil were admitted to probate by the surrogate of Monroe county, and administration granted to the persons named in the will as executors, and, some difference having arisen as to the effect of the codicil, this action was brought by Executor Newcomb and others against Executor Webster and others, for the purpose of obtaining a judicial construction of its provisions. The plaintiffs contend that the codicil revokes all the provisions of the will, except those relating to the appointment of executors, while the defendants suppose that both instruments can stand, and the legacies and devises in each take effect. The court at special and general terms have substantially sustained the view of the defendants, and from that decision the plaintiffs appeal. It may be taken as a well-settled general rule that a will and codicil are to be construed together, as parts of one and the same instrument, and that a codicil is no revocation of a will, further than it is so expressed. *Westcott v. Cady*, 5 Johns. Ch. 343. But if, regarded as one instrument, it is found to contain repugnant bequests in separate clauses, one or the other, or both, must fail; and therefore the rule is that of the two the bequest contained in the later clause shall stand. The same principle applies with greater force where there are two distinct instruments relating to the same subject-matter. In such a case an inconsistent devise or bequest in the second or last instrument is a complete revocation of the former. But if part is inconsistent, and part is consistent, the first will is deemed to be revoked only to the extent of the discordant dispositions, and so far as may be necessary to give effect to the one last made. *Nelson v. McGiffert*, 3 Barb. Ch. 158. In the case under consideration it appears that the testatrix, in her life-time, and after the making of the will, so dealt with the principal real estate described in it as by sale to revoke the gifts mentioned in the second and fourth clauses. She also acquired other real estate, and entertained a desire that beneficiaries other than those first selected should share in her bounty. These circumstances would naturally require a redistribution of her estate, and in view of them we think it clear that the testatrix intended to make new disposition of her entire property: Such is, at any rate, the effect of the language employed by her. There is, moreover, an express revocation of so much of the will as is inconsistent with the provisions of the codicil. If we apply this language literally, it is obvious that the entire will is to be discarded, except so much as appoints executors and defines their powers. The codicil does not deal with that subject,

and to that extent the testatrix was justified in regarding the will as a subsisting instrument. The codicil does, however, make a complete disposition of all the property of the decedent, either by special legacy or residuary clause. It is capable of operation without aid from the will, and in fact is entirely independent of it. The property, divided according to its terms, would leave nothing to apply upon the legacies or bequests of the will. The codicil, moreover, introduces new beneficiaries, and, while it provides also for persons already named in the will, does so, not by referring to the will or by way of increase or addition to shares given by it, but evidently by substitution; and then by formal and explicit language the testatrix gives to her four nieces all the rest and remainder of her estate, both real and personal, to be divided equally among them. The remainder here spoken of is that which is left after satisfying the legacies provided for in the same instrument, and it is impossible for the disposition made by the will to stand with that made by the codicil. Both instruments were, however, properly admitted to probate, for the appointment of executors by the will holds good, although the estate is to be administered according to the provisions of the codicil. The plaintiffs are, we think, entitled to a decree to that effect, and, so far as the judgment appealed from is to the contrary, it should be reversed, with costs to the appellants. But as the defendants have heretofore succeeded, they also should have one bill of costs, both to be paid out of the estate. All concur.

(73 Me. 595.)

RICH et al. v. GILKEY.¹

(*Supreme Judicial Court of Maine.* Nov. 28, 1881.)

1. REVOCATION OF WILLS—WANT OF TESTAMENTARY CAPACITY.

The destruction of a will or codicil by the testator does not operate as a revocation thereof, where, at the time, he did not possess sufficient mental capacity to make a will; the contents of the instrument destroyed may be proved by appropriate evidence, and the will or codicil thus be established.

2. SAME—BURDEN OF PROOF.

But the presumption in case a will or codicil is destroyed during the testator's life-time is that it was destroyed *animo revocandi*, and the burden is on the proponent to show that it was not revoked by the destruction, or by a ratification of the destruction, while the testator lived.

3. SAME—UNDUE INFLUENCE.

Where the act of destruction by the testator is produced by undue influence, the effect is the same as where a testator, not having testamentary capacity, destroys his will or codicil; the instrument destroyed stands unrevoked.

4. SAME—STATUTORY PROVISIONS FOR PROOF OF LOST WILLS.

The provision of the Maine statute of wills, (Rev. St. Me. c. 74, § 3,) that a will executed according to its requirements "is valid until destroyed, altered, or revoked by being intentionally burnt, canceled, torn, or obliterated by the maker, or by some person by his direction and in his presence, or by a subsequent will, codicil, or writing, executed as a will is required to be," etc., is not changed by a subsequent statute, (Rev. St. Me. c. 64, § 7,) providing that where a will "is lost, destroyed, suppressed," etc., "and upon proof of the continued existence of such will, up to the time of the decease of said testator unrevoked, letters testamentary shall be granted as on the last will of the deceased, the same as if the original will had been produced and proved;" such latter statute is declarative and cumulative only, and does not abrogate, or undertake to abrogate, the former act.

5. SAME.

By a codicil to his will, testator gave to his niece the income of certain property during her life; but about a year afterwards, and about a month before his death, he destroyed the codicil, and made another, disposing in a different way of the property given by the former in trust for her. In proceedings for probate of the destroyed codicil, it appeared that testator had had the warmest affection for his niece against all family opposition; that he had educated and supported her, and seemed desirous to make her dependent upon him for all her wants, and held out to her promises against want in the future; that he made the provision in her favor when he was in full health and strength, unasked by her, apparently uninfluenced by any one, with much deliberation, against family wishes; that he adhered to this codicil until his last sickness; and that he destroyed it only after he had lain a month on his death-bed, a very aged man, weakened by disease, surrounded by persons naturally disturbed by the existence of the codicil, and with no notice of its destruction to the beneficiary, or subsequent mention of it to her, although the affection between them continued unchanged. *Held*, upon a reference of the cause at the trial to the judge to "decide all questions upon the merits as affected by considerations of expediency and compromise," that the inference was irresistible that the act of destruction was caused by another or others, whether the influence exerted was undue influence or not; and that it was expedient to uphold the first codicil, allowing as concessions to the opponents that the latter codicil should also be probated, there being no contradiction between the two, except a recital in the latter which ignored the former; and that the costs and counsel fees of the beneficiary should not be paid out of the estate.

Appeal from judge of probate.

Sylvanus Rich, having made his will dated April 9, 1872, made a codicil thereto in March, 1879, giving to his niece, Mary A. Gilkey, during her life, the income of certain property of the value of \$10,000. On March 16, 1880, he destroyed this codicil, and made another, by which he made a different disposition of the property, which by the former codicil was given in trust to pay the income to his niece. He died April 18, 1880. In proceedings for probate of his will, the judge of probate upheld the destroyed codicil, and admitted it to probate. At the trial of the cause on appeal from his decision, the following entry was made by mutual agreement of the parties: "Referred to the presiding judge, who may decide all questions upon the merits as affected by considerations of expediency and compromise, including costs, and enter all and any decrees necessary to carry his decision into effect."

¹ Foot-note in 73 Me. 595: "This case was heard at *nisi prius*, and the report of it is here inserted because of the great learning employed in the preparation of the opinion, its literary merit, and the importance of the question discussed, together with the fact that other members of the court were consulted upon these questions, and, having carefully considered them, they concurred in the views expressed by Judge PETERS in all particulars."

A. W. Paine and John Varney, for plaintiffs. Barker, Vose & Barker, for defendant.

PETERS, J. When this cause was referred to me for decision, in view of the fact that the jury trial might be broken off by the sickness of a juror, I hardly comprehended the extent of the duties which have been cast upon me. I had supposed my office would be performed by the recommendation of some sum which the estate had better pay, and the other party had better receive, in a spirit of compromise, than to pursue the case to an end upon the strict application of legal principles and a close sifting of all the facts that might be produced in evidence. Had I anticipated that the respective parties would adhere so closely as they have to supposed legal rights, I should not have so readily taken upon myself a self-imposed responsibility. Having, however, examined and considered all the issues of law and fact sufficiently to form as satisfactory conclusions as it is probable I ever could arrive at, I file in the case the following opinion:

There is no doubt that Capt. Rich, the testator, destroyed the codicil in favor of Mary Gilkey in his life-time. The questions of fact are these: *First*. Was the testator at the date of the destruction of the codicil possessed of testamentary capacity? *Second*. If he had testamentary capacity, was he induced to do the act by undue influence? It would not be inconsistent to find that a testator was not possessed of sufficient mental capacity to make a will, and also that he was operated upon by undue influence. The questions of law are: *First*, whether, if the codicil was destroyed by the testator, while lacking the possession of testamentary capacity, it can be legally upheld and probated by means of oral evidence; and, *secondly*, whether the same result follows, if the destruction was induced by undue influence alone.

An examination of the questions of law comes first in the natural order. I feel clear in the belief that a person who has not testamentary capacity cannot revoke a will in any manner whatever. He can neither make nor unmake a will. A codicil stands upon the same footing as a will. A will, legally made, stands until legally revoked. It cannot be revoked by any act of destruction, unless the act is done with an intention to revoke; and a person not having testamentary capacity cannot have an intention to revoke a will; he is legally incapable of it. In such case the burning of the will can have no effect whatever, provided the contents can be clearly and certainly proved by other evidence. The written instrument may be burnt, the surest and best evidence of the will may be thus destroyed, but the will itself, if a draft of it can be proved, outlives the act of destruction, and the testamentary dispositions stand. This is a common principle in the law, applicable to the loss or destruction of papers and records generally. For instance, A. gives B. a deed of land. The deed is lost or accidentally destroyed; but the conveyance stands, if the contents of the deed can be

proved by satisfactory evidence. It is said that this opens a wide field for error and fraud, to establish wills upon oral evidence. To my mind, many more frauds would be committed if the contrary rule were admitted. It is upon proof complete and undoubted, and not upon less than proof, that wills may be orally established, it is to be noticed.

The counsel for the executors contend that, if a will destroyed after a testator's death can be upheld and established by oral evidence, one destroyed before his death cannot be. I do not concur in this view of the learned counsel. I do not find the distinction admitted by the authorities, excepting, possibly, where the law is so enacted in one or two of the states. Nor do I see the force of any such attempted distinction. I cannot well perceive that the act of wrongfully destroying a will five minutes before death would be valid, and the same act be not valid, if done by the same hand and in the same way five minutes afterwards.

It is said that a wrongful or accidental destruction of a will might take place many years before a testator's death, and in the mean time the testator might become satisfied with the fact of destruction, and in his mind ratify the act, and still the instrument be established as his will after his death, if this doctrine be tenable. But the answer to this apprehension of danger consists in the requirement of the law that any person propounding for probate a will destroyed in the testator's life-time has upon himself the burden to prove that, notwithstanding destruction, the will continued to be the will of the testator, unrevoked, up to the testator's death. The presumption would be that the will was destroyed *animo revocandi*, and the burden would be upon the proponent to show, by circumstances or otherwise, that the will was not revoked by the destruction, or by a ratification of the destruction, while the testator lived.

I think these views are sustained by the great current of authority. The English cases, earlier and later, are that way. The old work on Wills by Swinburne, who compiled his book as long ago as during the reign of Queen Elizabeth, gives this exception to the cases where a will becomes void by canceling or defacing: "Where the testament was canceled by the testator himself unadvisedly, or by some other person without the testator's consent, or by some other casualty." Jarman, the best authority on Wills, English or American, (volume 1, p. 130,) says: "The mere physical act of destruction is itself equivocal, and may be deprived of all revoking efficacy by explanatory evidence, indicating the *animus revocandi* to be wanting." He further says: "Thus if a testator inadvertently throws ink upon his will, instead of sand, or obliterates or attempts to destroy it in a fit of insanity, or tears it up under the mistaken impression that it is invalid, it will remain in full force, notwithstanding such accidental or involuntary or mistaken act." Mr. Bigelow, the American editor of Jarman's work, in his notes fully approves the doctrine quoted, citing many American cases.

in its support. The same doctrine is maintained by Prof. Greenleaf in his work on Evidence, (section 681, vol. 2,) and notes. Redfield, in his treatise on Wills, in many places restates the same rule; and upon page 323, vol. 1, (1st Ed.,) says: "The soundness of the mind and memory is requisite to the valid revocation of a will as to its execution. It follows, of course, that the performance of the mere act of tearing, canceling, obliterating, burning, etc., without the *animus revocandi*, and which could not exist unless the testator were in his sane mind, could have no legal operation upon the instrument." In Bacon's Abridgment (vol. 10, p. 546) it is laid down "that the destruction of a will, even by the testator himself, does not amount to a revocation, if the testator had not capacity. Though the instrument is not in being, if its contents are known it can be proved." Mr. Wharton expresses it this way: "Revocation will not be complete unless the act of spoliation be deliberately effected on the document *animus revocandi*. This is expressly rendered necessary by the will act, and is impliedly required by the statute of frauds." In Smith's Probate Law, a Massachusetts work of merit, at page 51, the author says: "It may be that the will was destroyed by the testator in a fit of insanity, or that it was lost, or accidentally or fraudulently destroyed. Such accidental or fraudulent destruction will not deprive parties of their rights under its provisions, if they can produce the evidence necessary to establish the will." In Clark v. Wright, 3 Pick. 67, a codicil fraudulently destroyed in the testator's life-time was established upon parol proof of its contents by the Massachusetts supreme court of probate. The same doctrine was affirmed by the same court in the case of Davis v. Sigourney, 8 Metc. (Mass.) 487, and reaffirmed in Wallis v. Wallis, 114 Mass. 510. In Newell v. Homer, 120 Mass. 277, the petitioner was held to prove a destruction of the will after the death of the testator, merely because he in his petition had so alleged the fact.

The New York cases are in accord with the foregoing cases. In Smith v. Wait, 4 Barb. 28, it was ruled that, if a testator was incompetent to make a will, he was incompetent to revoke a will made before, and that an insane man can have no intent such as is necessary to revoke a will. In Idle v. Bowen, 11 Wend. 227, it was held that a revocation by burning the will by the testator could be impeached by showing the incompetency of the testator at the time of the act. Schultz v. Schultz, 35 N. Y. 653, is an instructive case to the same effect. In Nelson v. McGiffert, 3 Barb. Ch 158, Chancellor WALWORTH held it was competent to show that a will had been destroyed by a testator when his mind had become so far impaired that he was incompetent to perform a testamentary act. The case of Johnson's Will, 40 Conn. 587, strongly supports the same view. So does the case of Collagan v. Burns, 57 Me. 449, as far as it goes. Many other cases in the state courts do.

Late cases in the English court of probate are emphatical in the same direction.

In one case it is said: "The act done [burning a will] by the testator can in no sense be his act, for he was out of his mind." In another case the court said: "All the destroying in the world, without intention, will not revoke a will; nor all the intention in the world, without destroying; there must be the two." In another case,—the famous case involving the will of Lord St. Leonards,—decided as late as 1876, the late Chief Justice COCKBURN said: "The consequences of a contrary ruling would be in the highest degree mischievous. To disallow oral proof might lead to the defeating of justice in many, if not in as many, instances as might arise from the court acting upon such testimony." Much more could be profitably quoted from late English cases, in elucidation of this legal question, did these limits allow.

The English cases have gone so far as to decide that a revocation of a will by spoliation may be of a conditional character. A testator destroyed a codicil not knowing that it disturbed a previous will. The court said: "Where there has been a physical destruction of a testamentary paper, the court has often been called upon to form an opinion as to the intention of the deceased at the time he did the act. In this case we have come to the conclusion that the testator destroyed the codicil with no intention of revoking the will, and that the court should give no more effect to the act than it would do if the testator had destroyed the paper under a mistake as to the instrument he was destroying. It was not done *animus revocandi*." The following cases will verify the foregoing propositions: Brunt v. Brunt, L. R. 3 Prob. & Div. 37; Cheese v. Lovejoy, 2 Prob. Div. 251; Sugden v. Lord St. Leonards, 1 Prob. Div. 154; James v. Shrimpton, 1 Prob. Div. 431; Brown v. Brown, 8 El. & Bl. 876; Powell v. Powell, L. R. 1 Prob. & Div. 209. I therefore have no doubt that a will destroyed by a person not possessing testamentary capacity is not a revocation of such will. There must be *animus revocandi*; and such a person does not and cannot possess an intention of revocation any more than an insane man can.

As to the question of law secondly stated, namely, the effect of the exercise upon the mind of the testator of undue influence, although at first having doubts about the point, I am of the opinion that the same result follows where the act of destruction is produced by undue influence as where incapacity exists. There can hardly be a logical difference whether the act of destruction be accomplished by a testator who has no mind to exercise, or, having a mind of his own, is prevented from exercising it. Insanity takes away testamentary power, while undue influence does not allow it to act. There must be *animus revocandi*. In the one case, Providence prevents it; in the other case, it is prevented by the wrongful act of man. In each case the hand of the testator acts, but the mind does not go with the act. The hands survive the head. If the rule were otherwise, the law would allow one man to cancel another man's will without his consent. It must be borne in mind

that, where undue influence is practiced, the testator's will is overpowered and subverted, and the will of another is substituted in its stead. He is not his own master. He does not act voluntarily, for his own volition does not play a part. Proper influences merely persuade the will, while undue influences take it away. The first are an appeal; the last are a usurping and conquering force. The old tree, forsooth, sends out its life, but the graft incorporated upon it turns it into unnatural fruit.

This is the more apparent from another view of the same facts. A man makes a legal will. In a codicil he undertakes to cancel the will. But if he has not mental capacity, or if he is induced by undue influences to attempt a revocation, the codicil is of no avail, and the will stands unrevoked. Suppose, however, instead of revoking the will by a codicil, the attempt is made to do it by destroying the will. Must not the act in this way be as free and unconstrained as if done in the other way? Does not the same principle apply? If the mind or will of the testator be held in imprisonment by undue influence, can it revoke a will in one way when it cannot in another? Can a testator accomplish by burning what, under the same conditions, he cannot do with pen and ink? I think not. The question in this phase has not so often arisen as in the form first discussed, namely, a want of capacity; but no particular distinction between the two is found in the cases, nor does, in my judgment, a valid distinction exist.

Then comes a question whether the general or common law is changed by any of our statutes. I think not. Section 3, c. 74, Rev. St., our statute of wills, is this: "A will so executed is valid until destroyed, altered, or revoked by being intentionally burnt, canceled, torn, or obliterated by the maker, or by some person by his direction and in his presence, or by a subsequent will, codicil, or writing, executed as a will is required to be," etc. This is substantially like the English statute of wills, and similar to statutes in most, if not all, the American states, and is in precise accordance and consistency with the views already expressed and the cases cited. Nothing can be much plainer. To revoke, there must be an intention to revoke. If a testator has not a sound or sane intention, he has no intention. If his intention is supplanted by another man's intention, then legally he has no intention.

But another statute is relied upon as up-setting or qualifying this statute. Section 7, c. 64, Rev. St., reads thus: "When the last will of any deceased person, who had his domicile in this state at the time of his death, is lost, destroyed, suppressed, or carried out of the state, and cannot be obtained after reasonable diligence, the execution and contents thereof may be proved by a copy, and the legal testimony of the subscribing witnesses to the will, or by any other evidence competent to prove the execution and contents of a will; and, upon proof of the continued existence of such will up to the time

of the decease of said testator unrevoked, letters testamentary shall be granted as on the last will of the deceased, the same as if the original had been produced and proved." The latter statute was first enacted in 1861. The former has existed ever since we were a state. Even if the phrase, "continued existence of such last will," means physical existence, which I do not agree to, even then the two acts are not inconsistent, and do not clash with each other. One would not repeal or limit the other, any more than the other would the one. One would go further in some respects than the other, and the other further in other respects. Each occupies its own ground. The 1861 act allows oral or parol proof of a will not destroyed, but which is merely suppressed or carried out of the state, while the other is silent about such a case. The act of 1861 is declarative and cumulative only, and does not abrogate, or undertake to abrogate, any other act. If the act of 1861 had been passed to alter the great body of the law of the world upon this subject-matter, its terms would have been more positive and significant. It directly admits "other evidence competent to prove the execution and contents of a will" than the will itself.

But my judgment inclines strongly to the belief that the phrase, "continued existence of such last will up to the time of the decease of such testator unrevoked," does not mean the continued physical existence of the will. The word "existence" sometimes means a physical and sometimes a legal existence. A will may have a physical and not a legal existence, and *vice versa*, or it may have both. A deed may be destroyed so as to have no physical existence, and still have a legal existence, if its contents can be proved. So a will may exist although the written instrument be destroyed, and oftentimes a will does not exist as a will although not destroyed. By the statute first quoted, "a will so executed is valid until destroyed by being intentionally burnt." If unintentionally burnt, it is still valid, is still a will, and still has a legal, but not a physical, existence.

I think the phrase, "continued existence * * * unrevoked," means no more than that the will shall continue or remain unrevoked. The statute in this respect merely repeats the requirement of the common law, that a person setting up a destroyed will shall show that such will had a continued legal existence down to the testator's death; that is, that the testator continued in the same mind down to the day of his death. The phrase "continued existence" is explained in *Betts v. Jackson*, 6 Wend. 173, to mean that the testator permitted it to stand as his will till his death; and it is there said: "The execution of the will not only must be proved, but there must be also satisfactory evidence of its existence at the death of the testator, or of his intention that it should exist and stand until his death; that the mere fact of due execution is not evidence of such existence or intention." The deduction is that if a will is made and adhered to by a testator till his death, and he desires it to exist, or sup-

poses it to, then it does legally exist till his death, unrevoked, though prior thereto it has been lost or mislaid, or accidentally or fraudulently despoiled. The writing or script may be gone, but the will remains. But, in either interpretation of the statute of 1861, the conclusions reached will stand. I am happy to add that I have consulted some of my judicial associates upon these questions, who have carefully considered them, and concur in the views expressed by me in all particulars.

So much for the law of the case; then as to the facts. Here I possess the functions of a jury. In deciding facts which are suitable for the jury tribunal, I feel a disposition to be somewhat influenced by what I think an intelligent and fair-minded jury, properly instructed, would be likely to do upon the same testimony. Certain important facts appear to me to be unquestionable, namely: That for Miss Gilkey, the beneficiary under the destroyed codicil, the testator had the fondest and warmest affection. Its depth and strength are disclosed by a continuous stream of evidence in his letters produced, which I think could never have been fully appreciated, had it come merely from the mouth of witnesses. He spoke it; wrote it; acted it. She seemed, partially at least, to fill a void in his heart created by the loss of a dearly loved wife, to whom she alone, of all the family about him, was related. This affection continued from her childhood to womanhood. It never abated. It baffled all family opposition. He educated and supported her, and seemed desirous to make her dependent upon him for all her wants. His letters held up before her vision the rainbow of promise against want in the future. In consonance with all this, when he found the sun of his life descending, although in full health and strength, unasked by her, uninfluenced by anybody that I can see, with much deliberation, against family wishes, he made this codicil. He took his executors as trustees of the fund, but fortified himself against doubt by adding another trustee. He resolutely adhered to the codicil till his last sickness, at least. Now, after he had lain a month on his death-bed, a very aged man, weighed down and weakened by disease, so far into the sunset of his life that the shadows of its twilight were fast settling over his understanding, surrounded by persons naturally disturbed by the existence of the codicil, with no notice to the beneficiary, with no after mention of it to her, the affection between her and him lasting till his last sands of life ran out,—he destroyed the codicil. What cause was there for this change which so suddenly came over his mind? I think the inference is irresistible that the act was caused by another or others, whether the influence exerted over his mind was an undue influence or not. What his strength did, his weakness would not have repudiated. How much truth in the situation scripturally described: "Verily, verily, I say unto thee, when thou wast young, thou girdest thyself, and walkest whither thou wouldst; but when thou shalt be

old, thou shalt stretch forth thy hands, and another shall gird thee, and carry thee where thou wouldst not." Nor was it unnatural that the heirs should have unwillingly seen this bestowment upon one not an heir, or that they should have resisted it. Perhaps it would have been unnatural in them if they had not resisted it. Undoubtedly they did no more than seemed proper to do, looking at the matter from their stand-point. Nor do I, possessing plenary powers, under the terms of the reference, feel bound to declare whether there was an undue influence exercised or not, or declare an absolute conclusion one way or another upon the issues, whether the testator was incapacitated from having a reasonable or intelligent intention of revocation, or whether the will was destroyed by him through some misunderstanding or mistake.

Suffice it to say that, under all the circumstances and conditions of the case, I deem it expedient to uphold the codicil in favor of Miss Gilkey as unrevoked, and allow it to be probated, allowing to the other side some concessions and considerations therefor. First of which (concessions and considerations) is that the last codicil shall also be probated. Logically, perhaps, if the first codicil stands, the second should fail. But as there is no contradiction between the two, except a recital in the last which ignores the first, both may stand. Precisely the same point occurred in an English case. *Robinson v. Clarke*, 2 Prob. Div. 269. The court there said: "In a testamentary suit where the parties have come to an arrangement, under the terms of which the court is applied to, to grant probate of two testamentary instruments, it will do so, provided such documents are not entirely inconsistent with one another." In *Goods of Honywood*, L. R. 2 Prob. & Div. 251, the court thought improper words in the recital of a will could be corrected by an explanation upon the record.

Another concession is that the taxable costs of the appellee, claimed to be several hundred dollars, shall not be recovered from the estate.

Another concession is that the estate shall not pay the expense of counsel fees to the appellee, though claimed, upon the ground that the estate should be taxed to pay for the expense of sustaining a codicil which by law should be sustained. But the bill therefor, \$500, which seems not an unreasonable amount for entire services, shall be paid by the executors, and charged to the earnings of the trust-estate now on hand. Or, if both parties should prefer it, I should award as above, and, instead of the life annuity, order an absolute conveyance to Miss Gilkey of the \$5,000 of Boston & Albany stock, together with the earnings of the \$9,000 of stocks named in the codicil, which have been due and payable since the death of the testator to this time. Or I would make any other commutation of the life-estate into ready money or absolute property which the parties may agree to. And whatever conclusion may be accepted, suitable decrees will be entered accordingly.

(61 Md. 478.)

ESCHBACH V. COLLINS *et al.*

(Court of Appeals of Maryland. March 26, 1884.)

1. ALTERATION OF WILLS—DEFACING WRITING.

The will of a testator, who had seven sons and three daughters, gave the residue of his estate to them in equal shares, "the share of my sons L. and J. to be held by each of them who may survive me, absolutely," and "the shares of my other children to be held for their respective lives." *Held*, that an obliteration of the names of L. and J. by the testator did not operate to enlarge the life-estate given to the other sons into a fee, and make the word "children" applicable only to the daughters, thus making a different disposition of the estate without the formalities required by statute; nor could the supposed intention of the testator, to diminish the fee-simple estates of L. and J. to life-estates, be regarded, since he had not adopted the means sanctioned by the law to carry it into effect; and the will must be read as it was originally written.

2. REVOCATION OF WILLS—OBLITERATION OF NAMES.

Such obliteration of the names of particular devisees does not make a case of revocation, within the provision of Code Md. art. 93, § 302, that "no devise in writing, * * * or any clause thereof, shall be revocable," except in the manner prescribed; the mere names do not constitute a clause, and their obliteration, by which a different meaning is imparted, is an alteration, not a revocation.

ROBINSON, J., dissenting.

Appeals from circuit court of Baltimore city.

Action by Elizabeth H. Collins and Richard Bernard, administrators with the will annexed, and trustees under the will of John Eschbach, late of Baltimore city, deceased, for the purpose of obtaining a judicial construction of said will. The will contained the following provisions: "*First*. [I hereby appoint my sons Leo Eschbach and John E. Eschbach executors of this, my last will and testament,] and direct them to pay my just debts and funeral expenses; giving them power, as executors, to sell, to such extent as may be necessary to make such payment, such parts of my estate, real or personal, as may be necessary, and the like power to any administrator of my estate. *Second*. I give, devise, and bequeath all the rest and residue of my estate, of every kind and description, which I may leave at the time of my death, to my said sons, [Leo Eschbach and John E. Eschbach,] and their successors in the trust thereby reposed in them; it being my will that there shall at all times be at least two trustees, and that one alone shall not be competent to act, and that, in case of death, refusal to act, inability from any cause, or resignation, that a successor or successors shall be appointed by some court having jurisdiction over trust-estates, in trust to and for the following uses and purposes: That the amounts which I have advanced or may advance up to the time of my death, to any of my sons or daughters, or to any son-in-law, evidenced by notes or otherwise, shall be ascertained by the said trustees, or their successors, as speedily after settling in the orphans' court as possible; and that the entire amount thereof shall be added to the rest and residue of my estate bequeathed as aforesaid; and the aggregate

amount thereof shall be divided into ten equal parts, the number of my present living children, by three disinterested persons, to be appointed by some court having jurisdiction over trust-estates, the decision of a majority of whom to be final, and such appointments to be continued until a division shall have been had; each of my sons to have one share, and to be charged with advances made or to be made to him; and each daughter to have one share, and to be charged with advances made or to be made to her or her husband; and the portion of each son and daughter in the said rest and residue to be reduced to the extent of such advance made, or to be made, as aforesaid; the division to be so made as aforesaid to be reduced to writing, and to show the share or portion of each, and each piece of property to be separately valued; the said division to be acknowledged before a justice of the peace by the parties making the same as their act and deed, and to be recorded in the court having jurisdiction of trusts making the said appointments, and also recorded among the land records of Baltimore city; the share of my sons [Leo] and [John E. Eschbach] to be held by each of them who may survive me, absolutely, and the trust hereby created to cease as respects them, or the one who may survive me. The shares of my other children to be held for their respective lives, my daughters' shares to be for their and each of their sole and separate use, freed from the control of any husband, and in no way liable for his debts. In case any of my said children, exclusive of [Leo] and [John E. Eschbach,] should die, leaving a child or descendant, then such share shall pass to such child, children, descendant, or descendants *per stirpes*, and not *per capita*; but, in case of the death of any such child, leaving no child or descendant at the time of such death, then the part or share of the one so dying shall pass to my surviving children and descendants of any deceased child *per stirpes*, absolutely and forever. * * * In case any of my ten children now living should die before me, leaving no child or descendant living at the time of my death, then my said estate shall be so divided as to reduce the number of shares, and to make the number equal to the number of my children who may survive me; and of such of my children as may have died before me, leaving a child or descendant surviving me, it being my will that in the case now supposed the descendant of a deceased child shall take the share of the parent; it being also my intention to pass life-estates to all my children and descendants of a deceased child, who may take at the time of my death, with the exception that my sons [Leo] and [John E. Eschbach] shall each, if he survives me, take absolute fee-simple estates in their respective shares."

When the will was found, after the death of the testator, the words in brackets in the foregoing extracts had been marked over with pen strokes, as if for the purpose of erasure, but were still legible. The testator left no widow, but he left ten children,—seven sons and three daughters

The court (DOBBIN, J.) adjudged and decreed that the true construction of the will as it stood affected by the erasures, which it was shown by the evidence that testator made therein, was that Leo Eschbach and John E. Eschbach were to be omitted as executors and trustees; and that the complainants were, under the order of 27th September, 1881, appointing them trustees under said will, in place of said Leo Eschbach and John E. Eschbach, to hold the estate of said testator for the trust purposes mentioned in said will, as affected by said erasures; that is to say, for the use of all the children of said John Eschbach for and during the term of their respective lives, the shares of the daughters to be for their sole and separate use, freed from the control of any husband, and in no way liable for his debts; and in case any of the said children of said testator die, leaving a child or descendant, then such share should pass to such child, children, or descendant or descendants, *per stirpes*, and not *per capita*; but, in case of the death of any child leaving no child or descendant at the time of such death, then the part or share of the one so dying should pass to the testator's surviving children, and descendants of any deceased child, *per stirpes*, absolutely and forever, freed from any further trust.

From this decree three appeals were taken,—one by the widow of Joseph A. Eschbach, a son; one by the executor of the said Joseph; and a third by judgment creditors of John E. Eschbach, another son.

A. Leo Knott, for Annie Maria Eschbach and executor of Joseph A. Eschbach. Bernard Carter and Arthur W. Machen, for Burke and Reddington, judgment creditors of John E. Eschbach. Richard Bernard, for appellees.

YELLOTT, J. The bill of complaint in this cause invokes a judicial construction of the will of John Eschbach, the meaning of which having been rendered ambiguous, obscure, and in some places apparently incomprehensible, by obliterations made by the testator a number of years subsequent to the date of its execution. The will was originally executed in conformity with the requirements of the statute prescribing the formalities to be observed in making a testamentary disposition of real estate. In the first clause two of the testator's sons, Leo Eschbach and John E. Eschbach, are appointed executors, with the usual directions in regard to funeral expenses and the payment of debts. In the second clause, the whole estate, real and personal, is devised and bequeathed to the said Leo and John E. Eschbach in trust. The testator then proceeds to declare the nature and purposes of the trust thus created, and the mode and manner in which it shall be executed, with a multitude of provisions not necessary to be here recited, as they involve no questions now presented for adjudication. The *corpus* of the estate is to be divided into 10 equal parts, corresponding to the number of the testator's children. Leo Eschbach and John E. Eschbach are each to take one-tenth, en-

tirely exempted from the operation of the trust, and to be held by them absolutely or in fee-simple. To the other sons and the daughters life-estates are given with remainders as prescribed by the terms of the will. It becomes important, in the construction of this will, to observe that none of the children of the testator are mentioned by name except Leo and John E. Eschbach. The others are simply designated as sons or daughters.

After the death of the testator the will was discovered with certain words written below the signatures of the attesting witnesses. This writing is somewhat deficient in perspicuity, which is, perhaps, attributable less to the imperfection of human language than to the peculiarity of the diction employed. It was not there when the will was executed. It has no attestation, but is supposed to be in the handwriting of the testator, and was signed by him. It is in these words: "February 3, '80. For Good and sound Reason, I arrest John E. Eschbach Name, and Leo Eschbach his Name, the above date, in Good Health and Reason, Signed the above date. JOHN ESCHBACH." In each clause of the will, wherever the names of Leo Eschbach and John E. Eschbach occur, a pen has been drawn across, leaving the names legible, but the writing partially defaced by the attempted obliterations. Two important changes in the will result from these erasures. The first is the removal of Leo and John E. Eschbach as executors and trustees. No question here arises for the determination of this court; the said Leo and John E. having declined to act as executors, and their formal renunciation being embodied in the record. The circuit court has also, in the exercise of its jurisdiction, and in conformity with the provisions of the will, appointed trustees, and Leo and John E. Eschbach have admitted and averred in their answer that said trustees have been duly appointed. But another and more material change has been effected by these erasures. The will, as originally executed, gave life-estates to all the sons except Leo and John E. Eschbach. The erasure of the two names operates to confer estates in fee-simple on all the sons. The testator says in the second clause: "The shares of my sons Leo and John E. Eschbach to be held by each of them who may survive me, absolutely, and the trust hereby created to cease as respects them, or the one who may survive me. The shares of my other children to be held for their respective lives," etc. The testator had other sons besides the two specially mentioned by name. Omit the words erased, and it will be seen at a glance that all the sons take absolutely, and the words "my other children" apply only to the daughters. Again, in the concluding portion of this clause, the testator says: "It being also my intention to pass life-estates to all my children and descendants of a deceased child who may take at the time of my death, with the exception that my sons Leo and John E. Eschbach shall each, if he survives me, take absolute fee-simple estates in their respective shares." He has erased the names of Leo Eschbach and John E.

Eschbach, and this obliteration manifestly creates a fee-simple estate in each son, and renders the word "children" applicable only to the daughters.

The first question presented for adjudication is whether a testator can, by the obliteration of certain words in his will, cause the transmutation of a life-estate into a fee-simple. This is the converse of the proposition presented by the case of *Swin-ton v. Bailey*, 1 Exch. Div 112. There the effect of the obliteration was to diminish an estate in fee-simple, and convert it into an estate for life. Chief Baron KELLY in the exchequer held that this could not be done. The judgment of the exchequer was reversed in the court of appeals, *COCKBURN*, C. J., saying: "Although it is a devise in fee-simple, I think that is (so far as it is a matter of revocation) divisible into two parts, and that the man who has given the larger estate may revoke the gift to that extent, and cut it down to the smaller gift or devise of an estate for life. It may be that you cannot add to the will." The decision of the court of appeals was affirmed in the house of lords, (48 Law J. 57.) The only principle determined in this case was that an estate might be diminished by the erasure of certain words, and any general observations made by judges, which extended beyond the scope of the question in controversy, could hardly be recognized as establishing a safe precedent, even within the jurisdiction where the decisions of that court must be received as authoritative. In *Larkins v. Larkins*, 3 Bos. & P. 20, Lord ALVANLEY, C. J., said: "If the remaining devises were to acquire any estate which they had not before, something beyond a mere revocation would be necessary."

A careful analysis of either the English or the Maryland statute would seem to lead irresistibly to the conclusion that every testamentary act by which property is transmitted should be authenticated in the manner prescribed by the legislature. A man may devise the whole of his estate in fee-simple. This is one testamentary act. He may subsequently change his intention, and, as the fee is susceptible of subdivision, he may determine to give a less estate. This would certainly be another and a distinct testamentary disposition, and, when it is alleged that he has so determined, the adduction of the proper proof is requisite. It is apparent that this proof must be supplied by the production of another will or a codicil properly attested and executed. Hence it would seem to have formerly been the settled doctrine in England that "any alteration that amounts to a new devise of the land requires that the will should be re-executed according to the statute." *Love. Wills*, 349.

The American cases fully recognize this doctrine, and, when an attempt has been made by interlineation or obliteration to make a different disposition of the estate, the attempt has been held to be abortive, and the will operated as originally executed. In *Jackson v. Holloway*, 7 Johns. 395, a testator, having made his will devising his lands then in possession to his four sons, subsequently acquired other

lands, which, by the statutes of the state, did not pass by a will executed antecedently to the seisin. He attempted an alteration by erasures and interlineations, so as to make the devise extend to all the lands of which he should die seised, and indorsed a memorandum to that effect on the will, stating the alterations which he had made. This memorandum was attested by two witnesses only. It was held that the erasures and interlineations did not destroy the original devise, but that the alterations, not having been attested by three witnesses, could not operate. The court said: "The obliterations in the will were made, not with an intent to destroy the devise already made, but to enlarge it, by extending it to lands subsequently acquired. The testator, however, failed in making interlineations and corrections which could operate, from not having the amendments attested according to law. The obliterations cannot, therefore, destroy the previous devise, for that was not the testator's intention." In *McPherson v. Clark*, 3 Bradf. Sur. 99, the testator attempted to revoke the devise to his daughter by striking out the words "my children," and inserting "my two sons." The court said: "This insertion is inoperative for want of re-execution and attestation; and, the intent failing as to the substitution intended, it must fail likewise as to the revocation intended. Enough remains on the face of the will to show that the word erased was 'children,' and the will must be so recorded." In the case of *Wolf v. Bollinger*, 62 Ill. 372, the testator, after having devised his estate to one person, afterwards attempted to transfer it to another. The alteration was made by an interlineation which was not attested in the presence of the testator. The court said that, for want of a compliance with this statutory requirement, the instrument did not operate as a disposing will. The cancellation was not made with intent to revoke the devise to the complainant simply, but with intent to substitute in her stead the defendant; and, the ultimate object of substitution having failed of accomplishment, the canceling, which was done only in the view of and in order to effect that object, should be esteemed for nothing, and be considered as not having been made absolutely, but only conditionally, upon the attempted substitution being made effectual. To give it effect, under the circumstances, would seem to be to thwart the intention of the testator, and make him instestate when he manifested a contrary intent by his will. In the case of *Bigelow v. Gillott*, 123 Mass. 102, there was an entire obliteration of the sixth and thirteenth clauses of the will by ink lines drawn through and across every word constituting those clauses. This was held to be a revocation of these two clauses, leaving intact the other clauses in the will. The court said: "He revoked the sixth and thirteenth clauses, and purposely and intelligently left the other provisions to stand as his will." "The argument that this view is in conflict with the provisions of law which require that a will disposing of

property should be executed in the presence of three witnesses is not sound. It is true that the act of revocation need not be done in the presence of witnesses; but such act does not dispose of the property."

If this was simply a case of revocation, its determination would involve a construction of section 302 of article 93 of the Maryland Code of General Laws, which prescribes the mode by which a revocation may be effected. The language of the statute is: "No devise in writing of lands, tenements, or hereditaments, or any clause thereof, shall be revocable" except in the manner designated. An entire will can thus be revoked, or any clause thereof. What, then, is a clause? Does it consist of two or three words which, disjoined from the context and transferred to a separate sheet of paper, would be devoid of sense or meaning? Do the mere names of two persons constitute a clause? Is not a clause always understood to mean one of the subdivisions of a written or printed document? Is the word ever used in any other sense? Wills are frequently subdivided into a number of clauses. In one, the testator may provide for the payment of his debts; in another, dispose of his personal property; in a third, devise his real estate; in a fourth, leave legacies; and then there may be a residuary clause. Is it not apparent that the statute has reference to one of these subdivisions of a will when the word "clause" is used in connection with "revocation?" It is true that a whole will might be revoked, or any clause thereof, by obliterating all the words necessary to give them meaning. To deprive a will of all meaning would be as effectual a revocation as if it had been consumed to ashes.

It is manifest that in the construction of this will a question is encountered that involves something more than mere revocation. The will has not been revoked; it has been altered. It cannot be supposed that when the legislature uses the word "revocation" it is to be construed to mean "mutation." "Revocation" is certainly not a synonym of "alteration." To revoke a testamentary disposition plainly means to annul it, and the revocation of a clause implies the destruction of that clause. In legal contemplation, it ceases to exist, and is as inoperative as if it had never been written. It is not necessary that the words erased should be wholly illegible, but the act of the testator must be such as to clearly indicate an intention to expunge the whole clause, so that it shall no longer constitute a subdivision of the will. But when, by the obliteration of certain words, a different meaning is imparted, there is not a mere revocation. There is something more than the destruction of that which has been antecedently done. There is a transmutation by which a new clause is created. There is another and a distinct testamentary disposition, which must be authenticated by the observance of the statutory requirements. The statute, after designating the modes of revocation, whereby that which has already been done is rendered inoperative by being destroyed, says, in language wholly free from ambiguity, and

therefore needing no construction: "Or unless the same be altered by some other will or codicil in writing, signed in the presence of three or four witnesses, declaring the same." There can therefore be no alteration in a testamentary disposition of real estate except by an observance of the formalities prescribed by the statute. In the will now to be construed, the obliterations, so far from operating as a mere revocation, by destroying the sense of the context, impart to the clause a different and more important significance. Not only does this become apparent, but it is also evident that the construction which has been contended would be productive of the very evils which the legislature intended to provide against. The obliteration of two or three words might wholly change the character of a devise. As aptly illustrated by learned counsel in argument, if the words were, "To my son William I give nothing, and give all my estate to my son John," the will could be made to read, without the insertion of any additional words, "To my son William I give all my estate." But, as already intimated, the record does not present a question of revocation. It is clear that the testator did not contemplate an intestacy. He evidently intended to make a testamentary disposition of the whole of his property. It was supposed by the learned judge of the circuit court that he intended by the obliterations to diminish the fee-simple estates of Leo and John E. Eschbach to life-estates. If such was his purpose, he has attempted to make another and a different devise of one-fifth of his whole property. He transfers the legal title, vested in Leo and John E. Eschbach, to trustees, and carves out the fee-simple equitable life-estates, with remainders to the children of the life-tenants. This is a new will, as respects one-fifth of his property. Let it be supposed, by way of illustration, that the entire estate had been devised to Leo in fee-simple. How could the testator subsequently vest the legal title in trustees, and create an equitable life-estate, with remainders? Not certainly by obliterations and interlineations, without attestation or the observance of any of the formalities prescribed by the statute. And is a testamentary disposition of the one-fifth of an estate governed by a different principle? The intention of a testator is only to be regarded when the law sanctions the means he has adopted to carry it into effect. If what he has done is invalid, the intent cannot be respected.

In the formation of a judicial opinion, the calm investigating faculty of reason should exercise a paramount control; but in an effort to ascertain, by an inspection of this mutilated will, the real intention of the testator, the aid of imagination seems to become necessary. The aged testator declined to seek the advice and assistance of those whose professional learning and experience would have afforded safe guidance, and, relying solely upon his own judgment, failed in the accomplishment of an intent which he has left involved in obscurity. The true construction of this will is that the attempt

ed obliterations are inoperative, and that the will must be read just as it was originally written and executed. The renunciation of Leo and John E. Eschbach as executors, and the appointment of the complainants as trustees, by the order of September 27, 1881, from which no appeal has been taken, render a construction of the first clause of the will unnecessary. The trustees appointed in conformity with a provision in the second clause, and by a competent court, having jurisdiction of trusts, have the control over the estate given to the trustees by the will as it was executed. The shares of Leo and John E. Eschbach are exempted from the operations of the trust thus created, and are to

be held by them absolutely and in fee-simple. The learned judge of the circuit court having sought to give effect to the supposed intention of the testator to diminish the estates of Leo and John E. Eschbach, his decree is, in this respect, erroneous. But no other error is perceptible in said decree, which must therefore be affirmed in part and reversed in part.

Decree affirmed in part and reversed in part, and cause remanded.

STONE and BRYAN, JJ., concurred. ALVEY, C. J., and MILLER and IRVING, JJ., concurred in the conclusion, but not the reasoning of YELLOTT, J. ROBINSON, J., dissented.

(See, also, *Lovell v. Quitman*, 88 N. Y. 377; *Quinn v. Quinn*, 1 Thomp. & C. 437; *Bigelow v. Giltott*, 123 Mass. 102; *Gardiner v. Gardiner*, [N. H.] 19 Atl. Rep. 651; *Forbing v. Weber*, 99 Ind. 588; *Mills v. Millward*, 15 Prob. Div. 20; *Austin v. Oakes*, 117 N. Y. 577, 23 N. E. Rep. 193; *Evans' Appeal*, 58 Pa. St. 238; *Duguid v. Fraser*, 31 Ch. Div. 449.)

(63 N. H. 475, 3 Atl. Rep. 604.)

HOITT v. HOITT.

(*Supreme Court of New Hampshire*. March 12, 1886.)

1. REVOCATION OF WILLS — STATUTORY REQUIREMENTS.

Where the legislature has prescribed certain modes by which a will may be revoked, the courts have no power to dispense with such requirements, and accept even a definite intention to perform the prescribed act for the act itself.

2. SAME—INTENTION TO REVOKE.

That a will is found, after testator's decease, in a bundle of papers of no pecuniary value, including drafts or memoranda of wills never executed, some of them apparently made since the date of the will, does not show a revocation of the will, in the absence of any act of revocation within the requirements of the statute.

3. SAME—IMPLICATION FROM CHANGE IN CIRCUMSTANCES.

Although such statute declares that a revocation may be "implied by law from changes in the circumstances of the testator or his family, devisees, legatees, or estate, occurring between the time of making the will and his death," a will is not revoked by the death of testator's wife and son, named in it as legatees, his subsequent remarriage without birth of issue therefrom, the alienation of the larger portion of his estate which had been specifically disposed of by the will, and the acquisition of property much greater in value than he possessed at the time of making the will; nor can a revocation be proved by such changes, as circumstantial evidence showing testator's intention.

4. SAME—EVIDENCE—DECLARATIONS OF TESTATOR.

Oral declarations of a testator that he understood his will was revoked, not accompanying any act of revocation, are not competent evidence to prove a revocation; nor are such declarations competent upon the testator's intention not to pass by his will after-acquired real estate.

Appeal from probate court.

Alfred Hoitt duly executed a will, bearing date February 12, 1864. At that date his family consisted of his wife and their six sons and seven daughters, of whom ten were of age. His wife died April 25, 1877, and one of his sons, who was one of four sons named in the will as residuary legatees, died unmarried in 1877. He married a second wife January 6, 1879, who survived him. There was no issue of the second marriage. The testator died No-

vember 9, 1883. At the time of making the will his estate amounted to some \$26,000, about two-thirds of which was realty, and consisted of eight different parcels. Included in the personalty were 60 shares of the Boston & Maine Railroad, and 20 shares in the Langdon Bank. These stocks were specifically bequeathed, but, with the exception of four shares of the railroad stock, were subsequently sold by the testator, and not replaced. All of the realty was specifically devised, but the testator afterwards disposed of the greater portion of it. He subsequently acquired by purchase and was possessed at his decease of other real estate of the value of about \$52,000. His entire estate, at the time of his death, was appraised at \$70,951.82. Four sons were named by the testator as residuary legatees, one of whom died unmarried in 1877. All the other children survived the testator. When the will was executed, the residue of the estate was inconsiderable. After the testator's decease the will was found in his safe, in a bundle of papers of no pecuniary value. Included in this bundle were several apparently incomplete drafts or memoranda of wills, never executed, without date, some of which were apparently made since the date of said will.

In the trial court the appellee offered evidence of the oral declarations of the testator to show that it was his understanding that the will was revoked, and also to show that it was not his intention to pass by his will after-acquired real estate. To this the appellant objected. The court sustained the objection, and the appellee excepted. The decree of the probate court disallowed the will.

Augustus Russ, Jeremiah Smith, and Dodge & Caverly, for appellant. *Marston & Eastman and Frink & Batchelder*, for appellee.

BLODGETT, J. No express revocation appears in this case. The will of the testator, executed in accordance with the statute formalities, has not been revoked by any subsequent "will or codicil, or by some writing executed in the same man-

ner, or by canceling, tearing, obliterating, or otherwise destroying the same by the testator, or by some person by his consent and in this presence," as required by Gen. Laws, c. 193, § 14. On the contrary, it was found in his safe after his decease, and in its original condition. It is true that it was in a bundle of papers of no pecuniary value, and that "included in this bundle were several apparently incomplete drafts or memoranda of wills never executed, without date, some of which were apparently made since the date of said will." But *Fellows v. Allen*, 60 N. H. 439, 441, is a recent and direct authority that the fact of a will being found among worthless papers works no revocation of it; and the authorities, as well as reason, demonstrate that the memoranda, which, at most, are merely evidentiary facts of an inchoate intention to make another will, have no legal significance as acts of revocation; for, although the purpose of the mind always gives character to the act done, still, the legislature having established certain modes by which a will may be revoked, it is not within the legitimate power of courts to dispense with such requirements, and accept even a definite intention to perform the prescribed act for the act itself.

Neither has the will become inoperative, as a whole, from necessity, either by an entire loss of the testator's estate, or its total alienation, or by the decease of all the devisees without descendants, and so leaving nothing upon which it can operate. If, therefore, there has been a valid revocation, it must be one arising from legal presumption or implication; and this in fact is the principal contention.

The existing statute as to the revocation of wills, which was originally adopted in 1822, after pointing out the modes by which a will may be revoked, expressly excepts any revocation implied by law from changes in the circumstances of the testator, his family, devisees, or estate, occurring between the time of making the will and his death. Gen. Laws, c. 193, §§ 14, 15. But what those changes are, section 15 does not in any manner attempt to define; and the effect consequently is to leave the matter of revocation by legal implication just as it stood before the enactment of that section. That is to say, section 15 (which in the act of 1822 was a proviso to what is now section 14) is to be taken, not as a recognition and adoption of the common-law doctrine of implied revocation, but as a recognition and adoption of the English decisions under sections 5, 6, and 22 of the English statute of frauds relative to the revocation of wills, passed in 1676; for the common law as to such revocations was abrogated by that statute. The English statute was doubtless the basis and model of our statute, directly or indirectly, and the proviso in the latter, we think, is to be regarded as merely explanatory of the preceding part of the section prescribing the manner of express revocation. Practically and in effect it was an adoption, under then existing conditions, of such implied revocations as had been introduced and established by the English courts, contrary to

the plain meaning of the English statute, and solely through the usurpation of legislative power. But the English courts did not go the length of establishing a rule that revocation might be shown by any change of circumstances affording satisfactory evidence of the testator's revoking intention, but stopped far short of it, and restricted its application to a few exceptional cases, as to which it was held the statute did not apply. Hence there is no tenable ground for holding that any causes of revocation were intended by our legislature to be embraced in the proviso to the act of 1822, aside from the existing exceptions established by the English courts upon supposed equitable considerations; and much less can it be held that any alteration was effected or intended by the Revision of 1842, making the proviso a separate section, and slightly changing its phraseology. And, as strongly tending to show that the purpose of the legislature was such as has been indicated, and that such has been the universal understanding of the bar of this state, it is a significant fact that no litigation has arisen as to the legislative intent, or the meaning of the language used in its expression, during the more than 60 years which have elapsed since the statute was first enacted.

No new cause of revocation being introduced by the statute, the true inquiry is whether the facts of this case bring it within any of the exceptions upon the subject of implied revocation recognized by the English courts after the adoption of the statute of 1676, which were quite limited in number, and reasonably well defined and understood at the time our statute was enacted. The causes assigned upon this point as ground of revocation are subsequent changes in the circumstances of the deceased, his family and estate. They are, substantially, the death of his wife and his son Franklin, both of whom were legatees; his second marriage, but without issue; the alienation of the larger portion of his estate; and its nearly threefold increase in value through natural causes and judicious investments.

But total revocation cannot be implied from the death of the wife and the son. "The death of a devisee is a contingency always in view." *SHAW, C. J.*, in *Warner v. Beach*, 4 Gray, 162, 164. "I know of no case," said *DENMAN, C. J.*, in *Doe v. Edlin*, 4 Adol. & E. 586, "where it has been held that the removal of an object of affection and bounty, by death, has been taken to be an implied revocation of a will, and, in my opinion, it does not operate so." And see *Fellows v. Allen*, supra.

Nor can it be implied from the testator's remarriage, because the indispensable common-law requisite of the subsequent birth of a child is lacking. 1 Jarm. Wills, (5th Amer. Ed.) 272; 1 Redf. Wills, 293; Pars. Wills, *59; Worth. Wills, *528. "This principle of law is incontrovertibly established." 4 Kent, Comm. 522. And in this connection it should also be borne in mind that the rule never applied except in cases where the wife and after-born children, the new objects of duty, were wholly unprovided for in the will, and where there was

an entire disposition of the whole estate to their exclusion and prejudice; therefore, inasmuch as the widow and children of a testator not provided for in a will are, under our statute, entitled to the same share of the estate as if he had died intestate, the sole reason upon which the rule was grounded no longer exists, and so the rule itself has become inoperative and obsolete in this jurisdiction.

The inquiry thus becomes restricted to the effect of the changes in the testator's property; the phrase "circumstances of the testator," etc., relating to new family ties, and not to changes in property. 4 Kent, Comm. 521, and authorities generally. But if it were apparent, as it certainly is not, that in the case of a testator an entire revocation by legal implication resulted, either before or after the statute of 1876, from any change whatever of condition or circumstances except that of a subsequent marriage and child, it is the undoubted general rule that a partial revocation only produces what is inaptly and inaccurately termed a revocation *pro tanto*, instead of an ademption, of the subject of the devise, and thus necessarily limits the operation of the will to the extent of the alienation; not, however, by reason of any defect in the will itself, but because it pleased the testator to make a disposition of such part of his estate different from what he originally intended, which it is always competent for him to do either by a conveyance, or a new will or codicil. See *Fellows v. Allen*, supra; *Carter v. Thomas*, 4 Greenl. 341, 343, 344; *Graves v. Sheldon*, 2 D. Chip. 71, 75; *Blandin v. Blandin*, 9 Vt. 210, 211; *Hawes v. Humphrey*, 9 Pick. 350; *Terry v. Edminster*, Id. 355, note; *Webster v. Webster*, 105 Mass. 538, 542; *Balliet's Appeal*, 14 Pa. St. 451; *Brush v. Brush*, 11 Ohio, 287; *Floyd v. Floyd*, 7 B. Mon. 290; *In re Nan Mickel*, 14 Johns. 324; *McNaughton v. McNaughton*, 34 N. Y. 201; *Warren v. Taylor*, 56 Iowa, 182, 9 N. W. Rep. 128; *Wells v. Wells*, 35 Miss. 638; *Brydges v. Duchess of Chandos*, 2 Ves. Jr. 417; 4 Dane, Abr. 576, 577; *Love. Wills*, 358; 1 Redf. Wills, 335; *Pars. Wills*, 63. "Conveying a part of the estate, upon which the will would otherwise operate, indicates a change of purpose in the testator as to that part; but suffering the will to remain uncanceled evinces that his intention is unchanged with respect to other property bequeathed or devised therein." *Weston, J.*, in *Carter v. Thomas*, supra, 344.

The remaining circumstance, that of the increase of the estate, upon obvious considerations of public policy, has no weight; and to this effect is the great preponderance of authority. *Warner v. Beach*, *Webster v. Webster*, *Graves v. Sheldon*, *Blandin v. Blandin*, and *Balliet's Appeal*, supra; *Brush v. Wilkins*, 4 Johns. Ch. 507, 518, 519; *Wogan v. Small*, 11 Serg. & R. 141, 145; *Vandemark v. Vandemark*, 26 Barb. 416; *Verdier v. Verdier*, 8 Rich. Law, 135. "A merely general change in the testator's circumstances, as it regards the amount and relative value of his property, will not in general, if ever, have the effect to revoke a will, since the testator, by suffering it to remain uncanceled, does

in effect reaffirm it, from day to day, until the termination of his conscious existence." 1 Redf. Wills, 298.

The conclusion, then, is that the subsequent changes in the circumstances of the testator, his family and estate, do not imply a revocation of his will. To effect a revocation both the English and New Hampshire statutes require certain specified things, which are lacking in this case, to be done, and not merely contemplated or even actually intended to be done. It is true that at an early day the English common-law courts fell into the error of exercising legislative power, and materially amending the statute of 1676 by enlarging its specific methods of revocation so as to include revocations founded upon new family ties and obligations on the part of the testator, arising from subsequent marriage, issue, and leaving wife and child without provision; and that, inasmuch as our statute must be regarded as a substantial re-enactment of that statute in the sense in which it had been interpreted by the English courts anterior to 1822, full effect must be given to their decisions, although plain encroachments upon legislative power; yet no rule was expressly established, and none can be inferred from the decisions, that makes it our duty to trespass still further upon the legislative domain, and so far judicially repeal the statute as to hold that the present case does not come within the purview of its fourteenth section. Even the English courts had come to a halt prior to 1822, and refused to extend the rules as to implied revocations beyond the precedents, and so have the American courts quite uniformly. See *Doe v. Barford*, 4 Maule & S. 10; *TILGHMAN, C. J.*, in *Wogan v. Small*, supra, and authorities generally.

The rule for which the appellee contends is that a revocation may be proved or disproved by any circumstantial evidence showing the testator's intention; but the precedents do not support the contention. On the contrary, after a most thorough examination of the cases reported before the enactment of the New Hampshire statute, it was unanimously held in *Marston v. Roe*, 8 Adol. & E. 14, by the 14 judges sitting in the cause, that implied revocation takes place in consequence of a rule or principle of law, independently altogether of any question of intention; and there is no reason to suppose that the legislature of 1822 took a different view of the reported cases. If their purpose was to make intention of itself a ground of revocation, and thus inevitably incite litigation and "produce infinite uncertainty and delay in the settlement of estates," the presumption is that the statute would have been drawn accordingly. Even *Johnston v. Johnston*, 1 Phillim. Ecc. 447, upon which great stress has been laid by the appellee, while holding the subsequent birth of a portionless child to be an indispensable requisite which would effect a revocation when aided by other circumstances, and a subsequent marriage not to be an essential requisite, does not hold that the revoking intent may be inferred from a general change of circumstances simply, but makes the controlling princi-

ple rest upon new moral obligations and family ties arising after the making of the will, and thus limits its application to cases of subsequent marriage or birth in which the wife or child would otherwise be left without provision for support. This case, however, is not relevant, the will being one of personality only, and the decision being made by an ecclesiastical court, unincumbered by statute provisions; and if it were relevant, its governing principle, when applied to this case, would be fatal to the appellees, for the reason that no child was born to the testator subsequently to the execution of his will. This being so, it is of no practical consequence here whether the doctrine of implied revocation rests upon the fact of a changed intention, as held in *Johnston v. Johnston*, or takes place in consequence of a rule or principle of law founded on a tacit condition annexed to the will itself when made, independently altogether of any question of intention, as held in *Marston v. Roe*; for the application of either principle to the facts of this case leaves the will unrevoked, because they fail to bring it within any of the exceptions introduced by the ecclesiastical or common-law courts.

But in respect of intention there is another consideration which may properly be adverted to. If the circumstantial evidence appearing in the case were competent in law and sufficient in fact to show a change of intention on the part of the testator as to his final disposition of his property, it would not appear that his intention would be less defeated by disallowing this will than by allowing it. The only issue is testacy or intestacy. To this issue the inquiry as to the testator's intention is limited; and, whatever testamentary change he may have thought of making, he had no thought of dying intestate, and leaving his property to be disposed of by the statutory rule of descent and distribution. There is no authorized conjecture that, if the alternative of intestacy or the unaltered will had been presented to him, he would have preferred the former rather than the latter. Hence, if all the circumstantial evidence were admissible, and if it proved all the appellee claims, the question it would present would be, not how the testator's intent could be carried into effect, but how it should be defeated. The choice would be restricted to two modes of violation, one testate, and the other intestate; and the former, supported by the written and uncontroverted evidence, which the law regards as the best, would prevail over the latter, which would be sustained by no proof, competent or incompetent, and by no presumption of law or fact. The testator not intending to die intestate, the decree of disallowance for which the appellee contends would be an intestate reversal of a testamentary purpose. "But Gen. Hoitt intended to change his will." Suppose he did; the change could not now be made. The intended alteration (if there was one) is not known, and the altering power has ceased.

The proffered oral declarations of the testator to the effect that he understood the

will was revoked, were rightly rejected. The mere understanding of a testator cannot revoke his will, for legal requirements cannot be thus abrogated; nor can his oral declarations, for wills cannot be revoked by parol; nor, upon the great weight of authority, are such declarations evidence, unless they accompany some act of revocation, and thereby become a part of the *res gestæ*. *Jackson v. Kniffen*, 2 Johns. 31; *Dan v. Brown*, 4 Cow. 483; *Clark v. Smith*, 34 Barb. 140; *Waterman v. Whitney*, 11 N. Y. 157; *Randall v. Beatty*, 31 N. J. Eq. 643; *Lewis v. Lewis*, 2 Watts & S. 455; *Hargroves v. Redd*, 43 Ga. 142, 160; *Gay v. Gay*, 60 Iowa, 415, 14 N. W. Rep. 238; *Rodgers v. Rodgers*, 6 Heisk. 489; *Smith v. Fenner*, 1 Gall. 170; *Doe v. Palmer*, 16 Adol. & E. 747; 2 Greenl. Ev. (9th Ed.) § 690; *Abb. Tr. Ev.* 124; 2 *Starke*, Ev. (3d Ed.) 1286; 1 *Redf. Wills*, 331.

Such declarations, also, were not competent, upon the testator's intention not to pass by his will after-acquired real estate. If a contrary intent is inferable from the will itself, it cannot be disproved by extrinsic evidence. If it is not thus inferable, and may be ascertained by the weight of competent evidence, his declarations are not a part of such evidence.

Decree of the probate court reversed. Will allowed.

ALLEN, J., did not sit. The others concurred.

(138 Mass. 45.)

SWAN v. HAMMOND.

(Supreme Judicial Court of Massachusetts. Oct. 23, 1884.)

REVOCATION OF WILLS—IMPLIED FROM MARRIAGE OF FEME SOLE.

The rule of the common law that the will of a *feme sole* is revoked by her marriage, while the will of a man is revoked, not by his marriage alone, but by marriage and the birth of a child, is recognized and made binding on the courts by Pub. St. Mass. c. 127, § 8, which, after declaring that no will shall be revoked unless by burning, tearing, etc., or some other writing, executed in the manner required in the case of a will, provides: "But nothing contained in this section shall prevent the revocation implied by law from subsequent changes in the condition or circumstances of the testator;" and the courts are not at liberty to change the rule as to the will of a *feme sole*, even if the reason of the rule is destroyed by the statutes giving married women testamentary capacity.

Appeal from probate court, Middlesex county.

E. F. Dewing and G. L. Sleeper, for appellant. W. B. Gale and W. N. Mason, for executrix.

COLBURN, J. It appears by the record and agreed facts in this case that Susan E. Haven, an unmarried woman, made her will May 20, 1853; that she was then possessed of real and personal estate, all of which by her will she devised and bequeathed to her sister, who was named as executrix; that on October 3, 1861, she married Thomas F. Hammond, and lived with him until her death, on January 18, 1883. Her husband had no knowledge of the existence of the will until after her decease. No child was born of the mar-

riage. The will was presented for probate in Middlesex by the executrix therein named, and was approved and allowed on April, 1888, and the husband appealed. The only question presented is whether the will was revoked by the marriage. It has been well settled by common law, at least since Forse and Hembling's Case, 4 Coke, 60*b*, (decided in 1589,) that the marriage of a *feme sole* revokes her will. In case of a man it is equally well settled that marriage alone does not revoke his will, but that marriage and the birth of a child do. 1 Jarm. Wills, 122; Warner v. Beach, 4 Gray, 162. The reason why the will of a *feme sole* is revoked by her marriage is commonly stated to be that marriage takes away her testamentary capacity, and destroys the ambulatory nature of her will; and it is urged in argument that since the statutes allowing a married woman to make a will, with certain limitations as to the rights of the husband, were passed, the reason upon which the rule was founded, that the will of a *feme sole* is revoked by marriage, no longer exists; and that her will, like that of a man, should be held to be revoked, not by marriage alone, but by marriage and the birth of a child. This argument is not without force, but its force would be much greater if we could see any good reason why, in the case of a man, both marriage and the birth of a child should be held necessary for the revocation of his will. The rule was adopted from the civil law, and is now firmly established as part of the common law; but the reason upon which it is founded is not obvious. Marriage alone, in the case of a man or woman, would seem to be a sufficient change in condition and circumstances to cause an implied revocation of a will previously made. A will made before marriage, and taking effect after marriage, must take effect in a very different manner from that in the mind of the testator when the will was made. The rights of the husband or wife must greatly modify its provisions; and it can hardly be supposed that an unmarried person would make the same will he or she would make after marriage. If we were under no restraint, we might well hesitate to hold that, since testamentary capacity has been given to women, a will made by a woman when sole should be revoked only by marriage and the birth of a child, as in case of a man, for the sake of uniformity only, when we are inclined to think a better rule would be that in case of a man his will should be revoked by marriage alone. But such a rule can only be introduced by the legislature. In England, by St. 7 Wm. IV. and 1 Vict. c. 26, § 18, and in many of the states in this country, it has been provided by statute that the wills of both men and women shall be revoked by marriage. See collection of statutes in 1 Jarm. Wills, (5th Amer. Ed., by Bigelow,) 122, note.

But we are of the opinion that the question now before us has been so far settled by statute as not to admit of change by construction. Section 8, Pub. St. c. 127, after providing that no will shall be revoked, unless by burning, tear-

ing, etc., or some other writing executed in the manner required in the case of a will, goes on as follows: "But nothing contained in this section shall prevent the revocation implied by law from subsequent changes in the condition or circumstances of the testator." It is not apparent that an entire revocation, by implication of law, results from any change of condition or circumstances except that of a subsequent marriage. See the discussion in Warner v. Beach, *ubi supra*. This clause as to implied revocations was first introduced into Rev. St. c. 62, § 9. The other provisions as to revocation were substantially taken from St. 1783, c. 24, § 2. The commissioners in their note to this section say: "The clause as to implied revocations recognizes and adopts the existing law, as established and understood among us." And their further discussion of this subject shows clearly that they had in mind the rule of the common law, that, in case of a man, marriage and the birth of a child, and, in case of a woman, marriage alone, revoked a will previously made. We are of opinion that this provision as to implied revocations, from its language, and the reasons given for its introduction, has substantially the force of an express enactment of the rules of the common law, which we are not at liberty to change, even if the reason for the rule, in case of a woman, no longer exists. This was the view taken in Brown v. Clark, 77 N. Y. 869, upon a similar question, under a statute of New York. We are therefore of opinion that the will of Susan E. Hammond was not properly admitted to probate. Decree of probate court reversed.

(65 Md. 373, 5 Atl. Rep. 295.)

BALDWIN *et al.* v. SPRIGGS.

(Court of Appeals of Maryland. June 22, 1886.)

1. REVOCATION OF WILLS — IMPLICATION — MARRIAGE AND BIRTH OF ISSUE — EXCEPTION.

A man's will is impliedly revoked by his subsequent marriage and the birth of a child. This doctrine rests upon the ground of a tacit condition annexed to the will, when made, that it should not take effect if there should be a total change in the situation of the testator's family; but the rule is subject to an exception, and is therefore not applied in cases where the testator has made provision for his children born after the execution of the will.

2. SAME.

Testator, married and having children, made a will which disposed of all the property owned by him at that time. Subsequently his wife died, and he married again, and had children by his second wife. He lived 20 years after the date of the will, and during that time acquired other real estate. *Held*, that this after-acquired property would not be considered as a provision for the children of the second marriage, so as to bring the case within the exception, but that the will was revoked.

Appeal from orphans' court, Anne Arundel county.

Proceedings to probate a will claimed to have been revoked by the testator's subsequent marriage and the birth of surviving issue. Decree for contestant, and proponent appeals.

Edward C. Gantt, for appellants. James

Revell and Daniel R. Magruder, for appellees.

STONE, J. There is no dispute about the material facts in this case. James Spriggs, of Anne Arundel county, on the 25th of July, 1865, duly executed his will. By that will he disposed of all the property, real and personal, which he then owned. James Spriggs, at the time of the execution of the said will, had a wife, Ruth Spriggs, then living, and several children by her, also living. By his said will he devised all his property to said wife and children. His wife, Ruth, died in 1871, and said James, soon after the death of said Ruth, about 1874, intermarried with Maggie E. Vane, and also had by her several children. Said James Spriggs died in January, 1886, leaving a widow, the said Maggie E. Spriggs, and a child by the said Ruth and children by the said Maggie E. surviving him. After the execution of the will the said James Spriggs purchased certain other real estate which was unaffected by said will. His will, as to his real estate, contained no residuary clause, but disposed of all the real estate he owned at its date, by specific description. After the death of James Spriggs his will was offered for probate in the orphans' court of Anne Arundel county, and a caveat was filed thereto by his second wife, Maggie E. Spriggs, in behalf of herself and her children, and upon such caveat plenary proceedings were had, and the orphans' court ordered and decreed that said will was revoked by his subsequent marriage and the birth of issue, and refused to admit the paper to probate. From this decree the daughter of the testator by his first wife and two of his grandchildren have appealed to this court.

These are all the facts necessary to elucidate the legal proposition which we are called upon to decide, and which is simply whether, upon this state of the facts, the will of James Spriggs has been revoked by operation of law. It would be a profitless task to review all the English cases on the subject. They may be found by the curious fully discussed by Chancellor KENT with his usual ability in the case of *Brush v. Wilkins*, 4 Johns. Ch. 506. It is enough for us to say that, after a good deal of doubt and hesitation, it was finally settled in England, before our Revolution, that marriage and issue taken together did amount to an implied revocation of a will previously made, and that such implied revocations were not within the statute of frauds, but that such implied revocations might be rebutted and controlled by circumstances. The final determination of the matter seems to have been reached by the cases of *Christopher v. Christopher*, 2 Dick. 445, (decided by the court of exchequer, PARKER, C. B., presiding, in 1771,) and in the case of *Spraage v. Stone*, 1 Amb. 721, (decided in 1773.) These cases appear to have definitely settled the law that a subsequent marriage and birth of a child, standing alone, and unaccompanied by other circumstances, amount to an implied revocation of a will.

The whole subject, says Chancellor KENT, has continued to receive great dis-

cussion in the English courts since the era of our Revolution, growing out of new cases constantly arising amidst the endless variety of human affairs. The most important of the English cases since the Revolution is the case of *Marston v. Fox*, 8 Adol. & E. 14, (decided in 1838 by 14 out of the 15 English judges,) where the general doctrine we have stated was reaffirmed. We will recur to this case again for another purpose. But we are not without decisive authority in our own state. The unreported case of *Sedwick v. Sedwick*, decided at June term, 1844, was a case similar to the one at bar. And the court of appeals decided that the subsequent marriage, and birth of a child, did revoke the will, and they affirmed the decree of the orphans' court refusing it probate. No opinion was filed in the case, although a large amount of property was involved, and the case was argued by some of the most eminent counsel in Maryland. But they did flatly decide the question by a decree declaring the will revoked by the subsequent marriage, and birth of a child.

But while such is the general rule, like other general rules, it has been held in England subject to some exceptions. Among the exceptions is the one where the testator has made provision for his children born after the execution of the will. As the origin of the rule was the duty of the parent to provide for his offspring, this exception seems right and proper. Another matter upon which the English courts have exercised themselves is the determination of the ground upon which the doctrine of implied revocation ought to be rested. This is of practical importance in this case, and will require some examination. Lord MANSFIELD, in the case of *Brady v. Cubitt*, 1 Doug. 31, thought the rule should rest on the presumption that the testator intended to revoke his will, and that it therefore followed that such presumption might be rebutted by even parol evidence,—to use his own words, that such presumption might be rebutted by "every sort of evidence." But Lord MANSFIELD's view seems to us irreconcilable with the statute of frauds. It would in effect allow the will to be revoked by the subsequent intention of the testator, without such intention being evidenced by the positive acts so expressly required by that statute. That view leads to another difficulty: that the testator may change his first intention, and adopt a contrary one; and, if so, which of the two intentions is to prevail? The conclusion, however, that Lord MANSFIELD reached, that every sort of evidence was admissible, was but the logical consequence of the ground upon which he rested the rule, namely, that of presumed alteration of intention. This case was decided in 1778. But the courts there seem to have felt the difficulties that would result from such a view, and Lord KENYON, in *Doe v. Lancashire*, 5 Term, R. 49, (decided in 1792,) placed the rule upon another ground, namely, a tacit condition annexed to the will, when made, that it should not take effect if there should be a total change in the situ-

ation of the testator's family. This view of Lord KENYON was afterwards adopted by Lord ELLENBOROUGH in the case of *Kenebel v. Scrafton*, 2 East, 534, (decided in 1802.) Finally, the court, in *Marston v. Fox*, heretofore cited, unanimously adopted the views of Lord KENYON, and it may now be considered as settled in England that the doctrine of implied revocation rests upon the ground of a tacit condition annexed to the will, when made, that it should not take effect if there should be a total change in the situation of the testator's family. In this we concur.

If we adopt the English rule that the will is not revoked if the testator makes provision for the children of the subsequent marriage, the question arises in the case at bar whether he can be considered to have made such provision by the purchase of the property acquired by him between the date of his will and his death. This question must be answered, both upon reason and authority, in the negative. The testator disposed of all the property he then owned, by his will; but he lived 20 years after its date, and in the mean time purchased other real estate, which the children of the second wife would share with those of the first. But the mere accumulation of additional property cannot, upon any ground of reason, be considered a provision made by the testator for the second set of children, any more than for the first set, as the latter are equally benefited by it. The injustice of considering after-acquired property a provision for these second children will be the more readily seen if we consider a case—and such have frequently occurred—where the beneficiaries under the will were comparative strangers, or remote collaterals. Again, if after-acquired property should be held a provision for the after-born children, how much prop-

erty must be so acquired? It could hardly be said that the purchase of an acre of poor land, or a cow or horse, could be so considered; and, if not, by what rule should the value of such property be estimated? But we are not without authority on this subject. In *Marston v. Fox*, above cited, the point was made that an after-purchased estate did not pass by the will, but descended to the son in fee, and thereby became a provision for him, and prevented the revocation; but in answer to this objection, the court said: "In the first place, we answer that no case can be found in which after-acquired property descending upon a child has been allowed to have that effect; and, indeed, such a proposition seems incompatible with the nature of a condition annexed to the will."

To determine that after-acquired property was a provision for the after-born child would be totally inconsistent with the theory that the rule of implied revocation rests upon the tacit condition annexed to the will, when made, that it should not take effect if there should be a total change in the situation of the testator's family. Instead of the change in the family, it would make a change in the property,—one of the essential elements to determine the implied revocation. The will of the successful testator would stand; that of the unfortunate would be revoked.

Upon the whole case presented by the record before us, we are of opinion that, the testator having disposed of the whole of the estate owned by him at the date of his will, and having again married, and had children by his second wife, and having made no provision for such children, his will was revoked by operation of law, and that the order of the orphans' court must be affirmed; the costs to be paid out of the estate.

(See, also, *Warner v. Beach*, 4 Gray, 162; *Smith v. Robertson*, 39 N. Y. 555; *Goodsell's Appeal*, 55 Conn. 171, 10 Atl. Rep. 557; *McAnnulty v. McAnnulty*, 120 Ill. 26, 11 N. E. Rep. 397; *Emery's Case*, 31 Me. 275, 17 Atl. Rep. 68; *Hart v. Hart*, 70 Ga. 764; *Havens v. Van Den Burgh*, 1 Denio, 27; *Riggs v. Palmer*, 115 N. Y. 506, 22 N. E. Rep. 188.)

(77 N. Y. 369.)

BROWN et al. v. CLARK et al.

(Court of Appeals of New York. May 20, 1879.)

1. REVOCATION OF WILLS — MARRIAGE OF FEME SOLE.

The New York statute, (2 Rev. St. N. Y. p. 64, § 44,) which provides that the will of an unmarried woman shall be deemed revoked by her subsequent marriage, declares an absolute rule. It does not make the marriage merely a presumptive revocation, which may be rebutted by proof of a contrary intention, but causes it to operate *eo instanti* as a revocation. The statutes conferring testamentary capacity upon married women have not abrogated this rule, that marriage effects a revocation.

2. REPUBLICATION OF WILL — REVIVAL OF REVOKED WILL.

It is a general rule of law that a codicil executed with the formalities prescribed by statute for the execution of wills operates as a republication of the will to which it relates, so far as the will is not changed by the codicil, and this rule has not been altered by the New York stat-

utes pertaining to wills. Hence the will of a *feme sole*, which has been revoked by her marriage, will be revived by the valid execution by her, after marriage, of a codicil, which clearly refers to and identifies the will; the publication of the codicil is to be deemed a republication of the will, and both together constitute the last will and testament of the testatrix.

3. EXECUTION — PRESUMPTION FROM RECITAL OF ESSENTIAL ACTS IN ATTESTATION CLAUSE.

Where the attestation clause in a will recites all the essential acts to constitute a due execution and publication of the instrument as a will, and the surrounding circumstances tend to corroborate the truth of the recitals, the fact that the witnesses, after the lapse of several years, fail to recollect affirmatively the facts recited, will not rebut the presumption of due publication arising from the attestation clause and the other circumstances.

Appeal from supreme court, general term, fourth department.

Proceedings before the surrogate of Monroe county by Fortune C. Brown and others, executors named in a codicil exe-

cut by Mary J. Clark Proctor, deceased, for probate of a will and codicil executed by said Mary J. Clark Proctor. The will was executed by the deceased, then Mary J. Clark, on August 25, 1873. She subsequently married Truman A. Proctor, and after such marriage, and on December 7, 1876, she executed a codicil. She died October 1, 1877. The surrogate denied probate of the will on objection by Warren C. Clark and others, and the executors appealed to the general term, where the decree of the surrogate was reversed, and the objectors appealed to this court.

J. C. Cochrane, for appellants. H. R. Selden, for respondents.

ANDREWS, J. The evidence justifies the conclusion of the surrogate that there was a due execution of the will of August 25, 1873. The will was drawn by Mr. Clark, who was a lawyer by profession, and was executed by the testatrix under his supervision. She was his adopted daughter, and sole legatee under his will. When her will was executed she had little, if any, property of her own, and her will was made to provide for the disposition of the estate which she would receive under the will of Mr. Clark in the event of her surviving him. In substance, the two wills constituted a scheme for the disposal of the property of Mr. Clark after his death and the death of the testatrix. The attestation clause is full, and recites all the facts constituting a due execution, and is signed by two witnesses. The witnesses were not lawyers, and were not, so far as appears, conversant with the statute requirements for the execution of wills, and when examined were unable to state that they signed the will as witnesses at the request of the testatrix, or that she at the time declared it to be her will. But it is undisputed that the testatrix executed the will in their presence, and that they were requested by some one to become witnesses to a will, and that they attended on the occasion of the execution of the will in pursuance of such request. There is no evidence contradicting the recitals in the attestation clause. Neither of the witnesses deny that it contained a true account of what occurred when the will was executed. The proof was taken five years after its execution. Mr. Clark was then dead, and no persons were living who were present at the execution except the two witnesses. The case is therefore one where the attestation clause recites all the essential acts to constitute a due execution and publication of the instrument as a will, and the other circumstances tend to corroborate the truth of the recitals. The witnesses, after a lapse of several years, fail to recollect affirmatively the facts attested by them over their own signatures. The mere non-recollection of witnesses, under these circumstances, would not justify a finding that the statute requirements were not observed. Their lack of memory does not rebut the presumption of due publication arising from the attestation clause and the other circumstances. Brinkerhoof v. Remsen, 8 Paige, 499, 26 Wend. 332; In re Kellum, 52 N. Y. 517.

We concur in the conclusion reached by

the surrogate that the will was revoked by the subsequent marriage of the testatrix. It was the rule of the common law that the marriage of a woman operated as an absolute revocation of her prior will. Forse and Hembling's Case, 4 Coke, 61. The reason of the rule is stated by Lord Chancellor THURLOW in *Hodsden v. Lloyd*, 2 Brown, Ch. 534. He says: "It is contrary to the nature of the instrument, which must be ambulatory during the life of the testatrix; and, as by the marriage she disables herself from making any other will, this instrument ceases to be of that sort and must be void." The rule that the marriage of a *feme sole* revoked her will was made a part of the statute law of this state by the Revised Statutes, (2 Rev. St. p. 64, § 44.) The language of the statute, that the will of an unmarried woman shall be deemed revoked by her subsequent marriage, is the declaration of an absolute rule. The statute does not make the marriage a presumptive revocation, which may be rebutted by proof of a contrary intention, but makes it operate *eo instanti* as a revocation. 4 Kent, Comm. 528.

It is claimed by the contestants that the testamentary capacity conferred upon married women by the recent statutes in this state takes away the reason of the rule of the common law, and that upon the maxim, *cessante ratione legis cessat lex ipse*, the rule should be deemed to be abrogated. Upon the same ground it might have been urged at common law that the marriage of a *feme sole* should only be deemed a revocation or suspension of her prior will during the marriage, and that when the woman's testamentary capacity was restored by the death of her husband, leaving her surviving, the will should be revived; but the contrary was settled. Forse and Hembling's Case: 1 Jarm. Wills, 106; 4 Kent, Comm. 598. But the courts cannot dispense with a statutory rule because it may appear that the policy upon which it was established has ceased. The married women acts confer testamentary capacity upon married women, but they do not undertake to interfere with or abrogate the statute prescribing the effect of marriage as a revocation. It was quite consistent that the legislature should have intended to leave the statute of 1830 in force, although the new statutes took away the reason upon which it was based. The legislature may have deemed it proper to continue it, for the reason that the new relation created by the marriage would be likely to induce a change of testamentary intention, and that a disposition by a married woman of her property by will should depend upon a new testamentary act after the marriage.

The remaining question is as to the legal effect of the codicil of December 7, 1876. This was executed after the marriage of the testatrix, and refers to the will by its date, and the names of the attesting witnesses; and in the body of the codicil the testatrix declares her intention thereby to republish, reaffirm, and adopt the will as modified by the codicil as her present will, in the same manner as if then executed by

her, and following this declaration is this clause: "Which, [codicil,] in connection with and amendment of my will, I now publish and declare together, as constituting my last will and testament." The codicil was executed with the formalities required by the statute. It was signed by the testatrix in the presence of two witnesses, and was attested by them in her presence, by her request; and she, at that same time, declared the instrument to be "a codicil to her last will and testament, and a reaffirmation of the latter." The original will was present when the codicil was executed, and the attention of the witnesses was called to it, and one of them examined and identified it.

The evidence leaves no room for doubt that the main purpose of the testatrix in making the codicil was to re-establish the will, which had been revoked by her marriage. The inference from the proof is that she understood the will had been revoked by her marriage. The codicil made some provision for a brother of the testatrix not contained in the will, but the paramount intention of the testatrix in executing the codicil was, as appears by the codicil and the extrinsic circumstances, to reaffirm the disposition of her property made by the will, so that the bulk of her estate should go according to its provisions. The contestants claim that the intention of the testatrix to reaffirm the will cannot take effect, for the reason that there was no republication of that instrument after her marriage, and that what occurred at the time of the execution of the codicil was a publication of that instrument only, and did not operate to revive the will, or incorporate its provisions with those of the codicil. The general doctrine is well settled that a codicil executed with the formalities required by the statute for the execution of wills operates as a republication of a will so far as it is not changed by the codicil. *Acherly v. Vernon*, 1 Comyn. 381; *Barnes v. Crowe*, 1 Ves. Jr. 486; *Moore v. White*, 6 Johns. Ch. 375; *Van Cortlandt v. Kip*, 1 Hill, 590, 7 Hill, 346. In *Van Cortlandt v. Kip*, 1 Hill, 593, *Cowen, J.*, said: "It seems to me that at this day it would be a violation of all reliable authority to deny that a codicil, duly attested to pass real estate, would *per se*, whether it relates to real or personal property, operate as a republication of a devise, unless the testator declares that he does not intend that it shall have that effect." This doctrine was attended with important consequences. By the English law prior to the wills act, (1 Vict. c. 26,) a testator must have been seized of the lands devised at the time of making his will, and after-acquired lands would not pass under a residuary devise; and this was also the rule in this state prior to the Revised Statutes. 4 Kent, Comm. 601. But the execution of a codicil was held to make the will speak as of the time the codicil was executed, and to extend a general devise to lands acquired intermediate the making of the will and the codicil. The cases in 1 Ves. Jr. 486, and 1 Hill, 590, *supra*, proceeded upon this doctrine. In each of these cases lands acquired by the testator, after making the

will, and before the execution of the codicil, were held to pass under the will. It was not essential to the application of this rule that the codicil should be annexed to the will, or express an intention to republish the will or refer to the devise. It was sufficient if the codicil was executed with the formalities required for the execution of a will of lands. *Goodtitle v. Meredith*, 2 Maule & S. 5; *Jackson v. Holloway*, 7 Johns. 394; *Jackson v. Porter*, 9 Johns. 312. The statute of frauds (29 Car. II.) enacted that all devises of lands shall be in writing, and signed by the devisor, or by some person in his presence, and by his express directions, and shall be attested and subscribed in his presence by three or four credible witnesses, or else they shall be void. Prior to 1830 this statute had been substantially re-enacted in this state, and governed the execution of wills here. 2 Rev. Laws, c. 23, § 2. It will be observed from the cases cited that the attestation of a codicil by the requisite number of witnesses was deemed a compliance with the statute, so as to make the will operate upon after-acquired lands, although they were not mentioned in the codicil, and there was no express republication of the will. The attestation of the codicil is, according to the decisions, an attestation of the will, within the meaning of St. Car. II. So, also, it was held that a will, revoked by marriage or otherwise, was revived by the execution of a codicil. *Lord Walpole v. Lord Orford*, 3 Ves. 402; *Neate v. Pickard*, 2 Notes of Cas. Adm. & Ecc. 406; 1 Jarm. Wills, 187; 1 Redf. Wills, 367. This subject is now regulated in England by the twenty second section of the wills act, (1 Vict. c. 26,) which provides, in substance, that no will or codicil which shall in any manner be revoked shall be revived otherwise than by the re-execution thereof, or by a codicil executed in the manner prescribed by the act, and showing an intention to revive the same.

Upon the authorities cited, it is clear that, under the law in this state as it stood prior to 1830, there was a valid republication of the will in question by the execution of the codicil of December 7, 1876. The Revised Statutes changed, in several respects, the ceremonies to be observed in the execution of wills; and, among other things, it is expressly required that the testator shall, at the time of making or acknowledging his subscription to the will, declare the instrument to be his last will and testament. 2 Rev. St. p. 63, § 40, subd. 3. There is nothing in the statute indicating that it was intended to change the rule that a codicil, duly executed, was a republication of the will. The codicil in the case of *Van Cortlandt v. Kip*, 1 Hill, 590, was executed after the present statute was enacted. It referred to the will executed in 1824, but did not in terms republish it, and made no reference to the lands acquired by the testator after the will was made; but the court held, in accordance with the law which existed before the Revised Statutes were passed, that the codicil was a republication of the devise in the will, and that the after-acquired lands passed to the surviving dev-

isee. The Revised Statutes did not affect the construction of wills made before the chapter relating to wills took effect. 2 Rev. St. p. 68, § 70. This case seems to be a direct authority that the due execution and publication of a codicil is, under the Revised Statutes, as it was prior thereto, a republication of the will to which it refers. The codicil in this case refers to the will, and expressly adopts and reaffirms it. The testatrix, by publishing the codicil, published the will, which was clearly identified by the reference in the codicil and the extrinsic proof. It is established by a long line of authorities that any written testamentary document in existence at the execution of a will may, by reference, be incorporated into and become a part of the will, provided the reference in the will is distinct, and clearly identifies, or renders capable of identification by the aid of extrinsic proof, the document to which reference is made. I will cite a few of them: *Habergham v. Vincent*, 2 Ves. Jr. 228; *Smart v. Prujean*, 6 Ves. 565; *Williams v. Evans*, 1 Cramp. & M. 42; *Allen v. Maddock*, 11 Moore. P. C. 427; *Burton v. Newbery*, 1 Ch. Div. 234; *Tonnell v. Hall*, 4 N. Y. 145. In *Williams on Executors* (page 97) it is said: "If a testator in a will or codicil or other testamentary paper, duly executed, refers to an existing unattested will or other paper, the instrument so referred to becomes part of the will;" and *Jarman* says, (1 *Jarm. Wills*, 78:) "A codicil, duly attested, com-

municates the efficiency of its attestation to an unattested will or previous codicil, so as to render effectual any devise of a freehold estate which may be contained in such prior unattested instrument;" and further on, speaking of the incorporation of documents by reference in the will, he says this is permitted "without violating the principle of the enactment which requires an attestation by witnesses, the testator's intention to adopt the contents of such instrument being manifested by a will duly attested." Page 88. In this case, if the will of Mrs. Proctor had been an unattested instrument, it would, upon the authorities, have been incorporated with and made a part of the testamentary instrument originally executed, by reason of the reference to it in the codicil. I am of the opinion that the publication of the codicil was a publication of the will, and that both papers together are to be considered as the will of the testatrix. There was no proof to sustain the allegations of undue influence or want of testamentary capacity in the testatrix when it was executed. The only question before us is one of law, upon substantially uncontroverted facts; and the order of the general term reversing the decree of the surrogate, and remitting the proceedings to him with directions to admit the will to probate, should be affirmed. *Hoystradt v. Kingman*, 22 N. Y. 372; *Gilbert v. Knox*, 52 N. Y. 125.

All concur. Order affirmed.

(See, also, *Haven v. Foster*, 14 Pick. 534; *McCurdy v. Neall*, 42 N. J. Eq. 333, 7 Atl. Rep. 566; *Scott v. Fink*, 45 Mich. 241, 7 N. W. Rep. 799.)

VIII. MUTUAL WILLS—JOINT WILLS—VALUABLE CONSIDERATION FOR A WILL.

(Read *In re Cawley's Estate*, p. 19, supra.)

(50 N. Y. 88.)

In re Diez's Will.

(*Court of Appeals of New York*. Nov. 12, 1872.)

1. WHAT CONSTITUTES A WILL.

Whether a written instrument is a contract or a will is to be determined by the dispositions which it makes, rather than by designations contained therein referring to it as a "matrimonial and testamentary agreement" or as a "contract."

2. SAME.

The distinguishing feature of a will is that it is not to take effect except upon the death of the testator. An instrument which is to operate in the life-time of the donor, and to pass an interest in property before his death, even though its absolute enjoyment by the donee is postponed until after the donor's death, or even though it be contingent upon the survivorship of the donee, is a deed or contract, and not a will. But if it is not to have any operation until after the maker's death, then it is a will, notwithstanding it may have been executed in pursuance of a previous promise or obligation appearing upon its face.

3. MUTUAL WILL.

An instrument in writing signed by a man and his wife, and executed with the formalities of a will, provided as follows: "Inasmuch as we have by joint exertions acquired the property now in our possession, and inasmuch as our only child has already departed this life in the tenderest age, we hereby determine that, upon the decease of one or the other of us, the surviving husband or wife shall receive the entire property of the one having died first,—that is to say, the existing jointly acquired property,"—to him or her unconditionally. *Held*, that the instrument was the will of the one who should first die, and not a contract, notwithstanding the reasons given for the dispositions.

4. EXECUTION—SEAL.

In New York a seal is not required to a will of real or personal estate; the testator must subscribe his name at the end, but need not attach a seal. 2 Rev. St. N. Y. p. 63, § 40.

Appeal from supreme court, general term, second department.

Proceedings by Ursula Diez before the surrogate of New York county for the probate of an alleged will of Frederick Diez. The testator was a naturalized citizen of New York state, domiciled in New York city. He went to Germany in May, 1868, and died at Southofen, Bavaria, November 1, 1868. Previous to his death the following instrument was executed:

"Matrimonial and also testamentary agreement: G. K. N., 898. This day, Sunday, November 1st, 1868, (one thousand eight hundred and sixty-eight,) at eleven A. M., appeared before me, Francis Xaver Malor, royal notary at Southofen, in the house No. 80 at Southofen, whither I went at once, according to the request of the parties. (1) The hotel proprietor, Mr. Frederick Diez, from New York, in the United States of America, at present being in Southofen, who, although lying in bed in an upper room in the above-named house, suffering from a complaint in the stomach and very weak, is in full possession of his mental faculties, and therefore must be deemed fully competent to make dispositions, whereof I have convinced myself by conversation with him. (2) His wife, Mrs. Ursula Diez, born Trunk, of the same place. Lastly, (3) the two impartial witnesses, whose presence had been especially requested, and who, after examination, have been found free of all exceptions — (a) The practicing physician, Dr. Leonard Stich, of Southofen; and (b) the merchant, Mr. Max Mathes, of Southofen; both of the latter I am personally acquainted with as to name, occupation, and residence, while the name, occupation, and residence of the former two persons were only made known to me by the two witnesses present. And Mr. Frederick Diez and his wife, Mrs. Ursula Diez, requested me to reduce to writing and certify in my official capacity the following: 'Matrimonial and also testamentary agreement: (I.) We have made, as yet, no conjoint disposition of any kind concerning the hereditary succession in case of death. (II.) Inasmuch as we have, by joint exertions, acquired the property now in our possession; and inasmuch as the offspring of our marriage, our only child, Mary Diez, has already, in the tenderest age, departed this life,—we hereby determine that, upon the decease of one or the other of us, the surviving husband or wife shall receive the entire property of the one having died first,—that is to say, the existing jointly acquired property,—to his or her unconditionally, free, sole possession and sole ownership, and shall not be bound to pay over anything to any person in case of a death. (III.) Also all former dispositions concerning the hereditary succession which may have been made by us singly, or with the consent of both, however and wherever made, between the living, or for the case of death, are hereby set aside and declared null and void. (IV.) We desire that a first exemplified copy of the foregoing matrimonial and also testamentary agreement be delivered to us, and we will bear (V.) the expenses incurred jointly.' Hereupon the present instrument was drawn up by special re-

quest of the parties, and after it had been read to them in the presence of the two above-named witnesses, and after their attention had been called to all such legal relations as might possibly stand in the way of such a contract, and after being approved by them, it was ratified to the full contents of it, and signed by them, by the two witnesses, and by myself, the undersigned royal notary.

"Mark of Mr. Frederick Diez, who is unable to write on account of great weakness; wherefore the two witnesses have subscribed for him." X

"URSULA DIEZ.

"L. STICH, Physician.

"MAX MATHES.

"FRANZ XAVER MALOR,

[L. s.] "Royal Notary."

This instrument was offered for probate by Ursula Diez, the widow of deceased. Probate was contested by Christian Supp, a residuary legatee under a former will. Contestant appealed from a decree admitting the will to probate. The general term of the first department sent the case to the second department, where the decree of the surrogate was affirmed, and contestant appealed to this court.

H. P. Townsend, for contestant and appellant. *F. S. Stallknecht* and *Elial F. Hall*, for proponent and respondent.

RAPALLO, J. * * * The two objections relied upon in the appellant's points are—*First*, that, not being under seal, the instrument cannot be regarded as a will of real estate; and, *second*, that it is in form a contract, and not a will.

The first objection is wholly unfounded; a seal is not required to a will of real or personal estate. The statute requires only that it be subscribed by the testator at the end. 2 Rev. St. p. 63, § 40; 1 Jarm. Wills, 70, note.

The second objection presents a more debatable question. The instrument is entitled, and refers to itself in one place as, a matrimonial and testamentary agreement, and in another as a contract, and contains no expression declaratory of its testamentary character, except the words "testamentary agreement," or, as translated in the first deposition, "contract of marriage and inheritance," and, in the third, "marriage and inheritance contract." These designations are not, however, conclusive as to the character of the instrument. That must be determined by the dispositions which it makes. 1 Jarm. Wills, p. 13; *Ex parte Day*, 1 Bradf. Sur. 482, and authorities there cited. These dispositions are, in substance, that Diez and his wife each declare that they thereby determine that, upon the decease of one or the other of them, the surviving husband or wife shall receive, unconditionally, the entire property of the one having died first; and that all former dispositions concerning the hereditary succession, which may have been made by either of the parties singly, or with the consent of both, are annulled. These provisions are preceded by a declaration of the motives leading to such a disposition of the property, which were that it had been acquired by the joint exertions of the par-

ties, and that their only offspring had in the tenderest age departed this life. It is claimed that the fact that the property, upon which the instrument was to operate, was the product of the joint labor of the parties, furnished a consideration for an agreement between them that, on the death of either, it should belong to the survivor, and that the instrument in question was such an agreement, and not a will. The distinguishing feature of a will is that it is not to take effect except upon the death of the testator. An instrument which is to operate in the lifetime of the donor, and to pass an interest in the property before his death, even though its absolute enjoyment by the donee be postponed till after the death of the donor, or even though it be contingent upon the survivorship of the donee, is a deed or contract, and not a will. But if the instrument is not to have any operation until after death, then it is a will, notwithstanding that it may have been executed in pursuance of a previous promise or obligation appearing upon its face.

Testing the document now before us by this rule, we think that it was the will of that one of the signers who should first die; that it did not purport to convey any present estate or interest in the property, or to deprive either of the parties of the absolute power of disposition of his or her own property, during his or her life, but was an arrangement testamentary in its character, and not intended to operate except upon the death of one of the parties, and then only as expressive of the intention of the one dying as to the posthumous destination of his or her property. It does not use words of grant or mutual contract, but states that the parties have determined that, upon the death of either, the survivor shall receive the entire property. The reasons given for this determination do not necessarily make it a contract. The fact that by the same instrument the husband and wife devised reciprocally to each other, or, in other words, that it was a mutual will, does not deprive it of validity. There is no just objection to such a form of testating. The instrument operates as the separate will of whoever dies first. Here, the husband having died first, it can be proved as his will, and the efficacy of his dispositions is in no way impaired by those portions of the instrument which, if the wife had died first, would have constituted her will, but which have now become inoperative. The result is precisely the same as if like reciprocal dispositions had been made by the husband and wife by means of two separate instruments. The combining of such reciprocal dispositions in one instrument is sanctioned by several authorities. *Ex parte Day*, 1 Bradf. Sur. 476; *Lewis v. Scofield*, 26 Conn. 452; *Evans v. Smith*, 28 Ga. 98; 1 Redf. Wills, 182; *Rogers*, Appellants, 11 Me. 303; *In re Stracey*, Deane & S. 6; *In re Lovegrove*, 2 Swab. & T. 453; *Dufour v. Pereira*, 1 Dick. 419; 2 Harg. State Tr. 310, 311.

The order should be affirmed, with costs. All concur.

Order affirmed.

(39 Ohio St. 639.)

BETTS v. HARPER.

(Supreme Court of Ohio. Jan. Term, 1884.)

JOINT WILLS.

Two sisters, each of whom owned personal property in severalty, and who were also seised of real estate as tenants in common, executed one and the same instrument, which, after providing for the payment of their debts, continued: "Second, that all of our property, both real and personal, go to James Betts and John Drue Betts and their heirs forever;" and it then appointed an executor, and revoked "all former wills by us made," and ratified "this and no other to be our last will and testament." This instrument was presented for probate after the death of both sisters. *Held*, that it should be admitted to probate as the will of both; that it was, in effect, the separate will of each testatrix, and might have been revoked by either, in so far as it was her will; and that upon the death of either it might have been probated, as her separate will. *Walker v. Walker*, 14 Ohio St. 157, limited.

Error to district court, Hocking county.

Agnes Harper and Penrose Harper, sisters domiciled in Hocking county, each owning personal property, and being owners as tenants in common of real estate in that county, signed the following instrument, dated April 17, 1862: "We, Agnes Harper and Penrose Harper, of the county of Hocking, in the state of Ohio, do make and publish this, our last will and testament, in manner and form following; that is to say: *First*, it is our will that our funeral expenses and all our just debts be first fully paid; *second*, that all of our property, both real and personal, go to James Betts and John Drue Betts and their heirs forever; *lastly*, we hereby constitute James Betts to be executor of this, our last will and testament, revoking and annulling all former wills by us made, and ratifying and confirming this, and no other, to be our last will and testament." This instrument was subscribed at the time of its execution by two witnesses in due form; and Agnes having died in 1872, and Penrose in 1874, the instrument was admitted to probate in the probate court of Hocking county, as their will, in April, 1875. In September, 1875, the heirs at law of Agnes Harper and Penrose Harper filed a petition in the court of common pleas of Hocking county, against James Betts and John D. Betts, to set the will aside. On the trial of the issue in the district court, to which the cause was appealed, the court charged the jury, in effect, that the will, being joint, was void; to which charge the defendants below excepted. A verdict having been returned in accordance with the charge, judgment was rendered setting the will aside. James Betts and John D. Betts filed this petition in error.

M. A. Daugherty and *J. C. Grogan*, for plaintiffs in error. *J. H. Collins*, for defendant in error.

OKEY, J. The construction placed by the majority of the court in *Walker v. Walker*, 14 Ohio St. 157, on the instrument there in question, viewed in the light of the facts existing at the time of its execution, was that the alleged will should be regarded as simply a compact, joint in form and substance, between Walker and

his wife, to treat their several estates as one estate, and jointly dispose of it as such among the objects of their bounty; that it was a matter of negotiation between them, and the disposition which each made of his or her property was influenced and modified by the disposition made of the property of the other; that each devise and bequest was, in fact, made in consideration of each and all the rest; and that it was part of the compact that neither of the parties should revoke or cancel the instrument, or any part of it, without the consent of the other. Moreover, subsequently to the death of Mrs. Walker, Walker, in violation of the agreement, conveyed to others portions of his lands so devised. The majority held that the instrument was not valid as a will, and that the remedy of the devisees and legatees, if they had any, was in equity to enforce the agreement.

Assuming, as we should,—more than 20 years having elapsed since the case was decided,—that the instrument received the proper construction, we are not disposed to question the decision. But it is said, in the opinion, that the policy of the state, as indicated in our legislation, is opposed to joint wills; and attention is directed to the language of the wills act, which it is said plainly refers to an instrument to be executed by one person only. It will be seen, however, that our statute is not peculiar in this respect. The provisions of the English statutes and the statutes of the various states upon the subject are precisely similar to our own; and the conclusion that they indicate a policy that two or more persons may not unite in the same instrument in making their wills, whatever the form of the instrument may be, is only reached by a rigid, and, as we think, altogether unwarranted, adherence to the mere letter of the statute. The provisions of the statute relating to the execution of deeds are similar, and yet nobody has ever doubted that any number of persons having an interest in property may join in an instrument conveying it.

The case before us is unlike the case of *Walker v. Walker*. Agnes Harper and Penrose Harper were each the owner of personal property, and they were owners as tenants in common of real estate. Each desired to bequeath her personal property to James Betts and John D. Betts, and each desired to devise to them her individual share of the real estate. They could unquestionably have done this by two instruments, but they could do it as effectually by one. This instrument was, in effect, the separate will of each. Either could have revoked it so far as it was her will. On the death of Agnes, in 1872, the instrument might have been admitted to probate as her will; and in 1874 it might have been admitted to probate as the will of Penrose; but in 1875 it was properly admitted to probate as the will of both. The authorities, it will be seen, are in some conflict; but the view we have stated is supported by reason and the manifest weight of authority. *Ex parte Day*, 1 Bradf. Sur. 481; *Diez's Will*, 50 N. Y. 88; *Mosser v. Mosser*, 32 Ala. 551; *Schu-*

maker v. Schmidt, 44 Ala. 454; *Wyche v. Clapp*, 43 Tex. 544; *March v. Huyter*, 50 Tex. 243; *Breathitt v. Whittaker*, 8 B. Mon. 530; *Lewis v. Scofield*, 26 Conn. 452; *Evans v. Smith*, 28 Ga. 98; in re *Stracey*, 1 Doct. & Stud. 6, 1 Jur. (N. S.) 1177; *Re Raine*, 1 Swab. & T. 144; *Re Lovegrove*, 2 Swab. & T. 453, 8 Jur. (N. S.) 442; and see *Denyssen v. Mostert*, L. R. 4 P. C. 236, 8 Moore, P. C. (N. S.) 502; *Gould v. Mansfield*, 103 Mass. 408; *Clayton v. Liverman*, 2 Dev. & B. 558; *Hershby v. Clark*, 35 Ark. 17, 23.

Judgment reversed.

(145 Mass. 69, 13 N. E. Rep. 10.)

WELLINGTON V. APTHORP.

(Supreme Judicial Court of Massachusetts.
Suffolk. Sept. 19, 1887.)

1. CONTRACT TO MAKE WILL — CONSIDERATION—
SERVICES TO BE PERFORMED.

A valid oral contract may be made to leave a certain sum of money by will to a particular person, in consideration of services thereafter to be rendered by the promisee to the promisor, provided such services are in fact thereafter rendered and accepted in pursuance of such contract, although the promisee did not bind himself in advance to render them. The performance of the consideration renders the contract binding, and gives a right of action upon it.

2. SAME.

A., brother-in-law of B., who was an unmarried woman, had from time to time advised the latter as to her business affairs, and at length, as she found his services valuable, she told him that, if he would continue to act as her agent and adviser respecting her investments, she would make a will leaving to her sister, A.'s wife, \$5,000, or, in the event of his wife's dying before him, she would then, by a new will or codicil, leave him \$5,000. He assented to this, and she made her will accordingly, leaving \$5,000 to A.'s wife. After this time A. took responsible charge of her business matters to a large extent for about 10 years, and negotiated several profitable investments for her upon his own judgment. Then a new arrangement was made. A.'s wife fell ill, and, after it had become apparent that this illness would prove fatal, B. told A. that she wished to go to California, and that if he would accompany her there some months later she would, in consideration of his so accompanying her, and of the services he had rendered and might thereafter render, respecting the management of her property, make a will giving him \$5,000, and would pay the expenses of the journey. A. assented, and B. thereupon destroyed the will in favor of A.'s wife, and made a new will, giving A. \$5,000. After the death of A.'s wife, A. went with B. to California, being gone several months. Upon his return he married again without B.'s knowledge, and when the latter heard of the marriage she revoked the will which she had made in his favor, (two years and a half having elapsed since this will had been made,) and made another will, giving him nothing. *Held*, in an action against B.'s administrator *cum testamento annexo*, that the facts showed a valid contract on the part of B. to leave A. \$5,000, which was enforceable against the administrator, since A. had completely fulfilled his part of the contract.

On exceptions from superior court.

Action of contract by Darius Wellington against John V. Apthorp, as administrator with the will annexed of the estate of Mary Chism, deceased, upon an agreement, as the plaintiff alleged, made by her with the plaintiff on or about May 23, 1878, to bequeath to him, by her last

will, the sum of \$5,000, and pay his expenses of a journey to California and Nevada in accompanying her there in the fall of 1878; and also, upon an account annexed, for services in managing her property, in accompanying her to California and Nevada, and for cash paid as expenses on said visit. Hearing in the superior court for Suffolk county, before BACON, J., before whom it appeared that plaintiff, after returning from the visit to California and Nevada, married without the knowledge of testatrix, and that when she heard of such marriage she revoked a prior will leaving plaintiff \$5,000, and made a new one leaving him nothing. The court found for the defendant, and, upon the plaintiff excepting, reported the case for the determination of the supreme judicial court.

J. S. Patton, for plaintiff. *A. M. Howe* and *T. J. Homer*, for defendant.

C. ALLEN, J. It is not contended, on behalf of the defendant, that a contract, founded on a sufficient consideration, to make a certain provision by will for a particular person, is invalid in law. The contrary is well settled. *Jenkins v. Stetson*, 9 Allen, 128, 132; *Parker v. Coburn*, 10 Allen, 82; *Canada v. Canada*, 6 Cush. 15; *Parsell v. Stryker*, 41 N. Y. 480; *Thompson v. Stevens*, 71 Pa. St. 161; *Updike v. Ten Broeck*, 32 N. J. Law, 105; *Caviness v. Rushton*, 101 Ind. 500.

Nor is it contended that a contract to leave a certain amount of money by will to a particular person, though oral, is open to objection under the statute of frauds. It is not a contract for the sale of lands, or of goods; and it may be performed within a year. *Peters v. Westborough*, 19 Pick. 364; *Fenton v. Emblers*, 3 Burrows, 1278; *Ridley v. Ridley*, 34 Beav. 478; *Kent v. Kent*, 62 N. Y. 560; *Bell v. Hewitt*, 24 Ind. 280; *Wallace v. Long*, 105 Ind. 522, 5 N. E. Rep. 666. Such a contract differs essentially from a contract to devise all one's property, real and personal, which comes within the statute of frauds. *Gould v. Mansfield*, 103 Mass. 408. The obligation of such a contract is not impaired, though the consideration is to arise wholly or in part in the future, and though the person to whom the promise is made is under no mutual, binding obligation on his part. In *Train v. Gold*, 5 Pick. 380, 385, it was said by Mr. Justice WILDE that "if A. promises to B. to pay him a sum of money if he will do a particular act, and B. does the act, the promise thereupon becomes binding, although B., at the time of the promise, does not engage to do the act." This doctrine was quoted with approval in *Gardner v. Weber*, 17 Pick. 407, 413, and in *Bornstein v. Lans*, 104 Mass. 214, 216; and it is also affirmed in *Goward v. Waters*, 98 Mass. 596. In *Cottage Street Church v. Kendall*, 121 Mass. 528, 530, it was held that "where one promises to pay another a certain sum of money for doing a particular thing, which is to be done before the money is paid, and the promisee does the thing upon the faith of the promise, the promise, which was before but a mere revocable offer, thereby becomes a complete

contract, upon a consideration moving from the promisee to the promisor; as in the ordinary case of the offer of a reward." See, also, *Paige v. Parker*, 8 Gray, 211, 213; *Hubbard v. Coolidge*, 1 Metc. (Mass.) 84; *Todd v. Weber*, 95 N. Y. 181, 192; *Miller v. McKenzie*, Id. 575, 579. It is therefore in law competent for a valid oral contract to be made to leave a certain sum of money by will to a particular person, in consideration of services thereafter to be rendered by the promisee to the promisor, provided such services are in fact thereafter rendered and accepted in pursuance of such contract, although the promisee did not bind himself in advance to render them. The performance of the consideration renders the contract binding, and gives a right of action upon it.

The objection mostly relied on by the defendant in the present case is that the auditor's report does not conclusively show such a contract, upon such a consideration. The auditor does not in terms, as he might properly have done, make any specific finding upon the question whether there was such a contract; but he states the facts in detail upon which he considered that question to rest, and leaves the determination of it to the court. The detailed facts stated by the auditor are not controverted, and the evidence upon which they were found is not before us. These facts are therefore to be taken as they stand, with no further explanation than is afforded by the circumstances. Looking at them in this manner, it is to be determined whether, on the whole, there is enough clearly and decisively to show that there was a contract, so that the judge who heard the case could not properly find the contrary; in other words, whether it appears there was a promise by the defendant's testator sufficiently definite to be enforced, and made with the understanding and intention that she would be legally bound thereby. A promise made with an understood intention that it is not to be legally binding, but only expressive of a present intention, is not a contract. *Thurston v. Thornton*, 1 Cush. 89; *Chit. Comm.* (11th Amer. Ed.) 12, 13.

Ordinarily, when there is a distinct promise for a sufficient consideration to do a particular thing, such promise is to be considered as a contract, unless there is something in the subject of the promise, or in the circumstances, to repel that assumption. But each case must be examined in the light of its own circumstances. In the present case it appears that the plaintiff was the brother-in-law of the defendant's testator, who was an unmarried woman; that he was early in the habit of advising with her about her business affairs, and not at the outset, if ever, in the expectation of being paid directly for his services. Nevertheless, there soon came to be a recognition on her part that the plaintiff's services were valuable in a money sense, and an intention to pay him for them in some form. By his advice, in 1866, she bought real estate on Chauncy street, and sold it again in 1868, at a profit of \$10,000, the sale being advised and ne-

gotiated by him. Prior to the sale, she told him that, if such profit should be made, he should have one-half or a part of it. In fact, nothing was paid to him at this time, but it appears that she already contemplated putting the relation between them on a business basis; and shortly afterwards she told him that, if he would go on and act as her agent and adviser respecting her investments, she would make a will giving his wife \$5,000; and, in the event of his wife's dying before him, she would then, by a new will or codicil, bequeath the legacy of \$5,000 to him. He assented to this, and she made her will accordingly, bequeathing \$5,000 to his wife. All this savored of a business arrangement. The sum mentioned was not greater than she had talked of paying to him, as a part of the profits on the sale of the Chauncy street real estate; indeed, not so great, for that was to be payable in 1868, while the bequest would not be payable till after her death. In 1868 another purchase was made of real estate, which was sold at a profit in 1869. In 1869 he admitted her to share in a purchase of real estate on Bedford street, which he had intended to make on his own account; the whole of the money was furnished by her; and in 1873 and 1874 the estate was sold at a profit of between \$4,000 and \$5,000, over and above the allowance to her of 7 per cent. interest on the purchase money, and this profit was equally divided between them. In 1876 a purchase was made of real estate on Mt. Vernon street. All of these purchases and sales were negotiated and advised by the plaintiff, and were made solely upon his judgment.

Such were the relations of the parties up to 1878. She had paid him nothing for his services; but her will, bequeathing \$5,000 to his wife, had stood during all this time according to the understanding between them in 1868. Nothing had been said or done to vary the effect of her promise to bequeath the legacy of \$5,000 to him, in the event of his wife's dying before him. In 1878 a new arrangement was made. The plaintiff's wife was fatally ill, and died in June of that year. A few weeks before her death, and when it had become apparent that she was fatally ill, the defendant's testator told the plaintiff that she desired to visit California, and a brother, who resided in Nevada, and, if he would accompany her there in the fall of that year, she, in consideration of his so accompanying her, and of the services he had rendered and might thereafter render her respecting the management of her property, would make a will giving him \$5,000, and pay the expenses of the journey. The plaintiff assented thereto, and in May or June of that year she destroyed the will then existing, and executed a new one, wherein she gave to him a legacy of \$5,000. According to the terms of what she had proposed in 1868, she was, by a new will or codicil, to bequeath to him the legacy of \$5,000. In the event which was now at hand, if he would go on and act as her agent and adviser respecting her investments. This he had done up to that time. She now proposed to him that she would make a will giving him

\$5,000 in consideration of his accompanying her to California and Nevada, and of the services he had rendered and might thereafter render to her. There was no stipulation binding him to render such services for any particular length of time in the future. The most that could fairly be implied is that he should render them as requested, and as long as he should be able to do so. Her proposition appears to have been intended as in the nature of business. The relations between the parties in the past had not been merely those of kindness and voluntary aid. The services which he had already rendered were substantial, and of a business character. They did not consist merely of advice, but he appears to have taken, to a large extent, the responsible charge of her business matters, and to have conducted them successfully. In addition to continuing such services, he was now asked to accompany her to California, which he did, in the fall of 1878 and the winter following,—a trip of several months. She proceeded at once to act upon his acceptance of her proposition, and made a new will accordingly. This new will remained unrevoked for two and a half years. In view of all these circumstances, it seems to us that, upon a just construction of the auditor's report, there is not enough to repel the ordinary assumption that the promise of the defendant's testatrix was a contract, which, when made, was intended and understood by both parties to be binding upon her.

The present case materially differs in its facts from *Maddison v. Alderson*, 8 App. Cas. 467, 5 Exch. Div. 293, and 7 Q. B. Div. 174. In that case doubt was expressed whether there was a contract, but the question was not finally determined. It depended in part upon a review of testimony, which is not fully reported. The terms of the alleged promise and consideration differed from those in the case before us in certain respects, which might be found to be material. But the decision in that case turned finally upon the question whether, assuming a contract, it had been shown that there had been a part performance sufficient to take it out of the statute of frauds, and it was held in the negative.

Upon the auditor's report in the present case, we must now assume that the whole consideration stipulated for was performed by the plaintiff, and that it was sufficient. It is expressly found that his advice was valuable, and his management judicious, being given and rendered whenever requested or required; that he has received no compensation therefor, except as stated, respecting the division of the profits arising on the sale of the Bedford street real estate; that in the fall of 1878 and the winter following he accompanied her to Nevada and California, "and then and thereafter in all respects complied with and fulfilled the aforesaid agreement."

It is also suggested in behalf of the defendant that, even assuming a contract, it was not proved to be a contract to make a will which should not be revoked. But, looking at the language used in the light of the circumstances existing and

preceding, so narrow a construction of the contract is not permissible. The substance of it was that she would bequeath to him the sum mentioned. An instrument effectual as a will was clearly contemplated; otherwise the promise was but illusory.

(See, also, *Taylor v. Mitchell*, 87 Pa. St. 518; *Hendricks*, 99 Mo. 478, 12 S. W. Rep. 887; *Todd v. 476*; *Schumacher v. Schmidt*, 44 Ala. 454; *Lewis v. Scofield*, 26 Conn. 452.)

The result is, in the opinion of a majority of the court, that the plaintiff is entitled to judgment for the sum of \$5,000, and interest, in addition to the amount found at the trial. The defendant's exceptions are overruled, and the plaintiff's exceptions are sustained. Ordered accordingly.

IX. LEGACIES.

(118 Ind. 147, 20 N. E. Rep. 733.)

ROQUET v. ELDRIDGE et al.

(Supreme Court of Indiana. April 2, 1889.)

1. LEGACIES—SPECIFIC.

A legacy is specific when it can be satisfied only by the transfer or delivery of some particular portion of, or article belonging to, the estate, which the testator intended should be transferred to the legatee *in specie*.

2. SAME—DEMONSTRATIVE.

A demonstrative legacy is a bequest of a sum of money payable out of a particular fund or thing. It is a pecuniary legacy, given generally, but with a demonstration of a particular fund as the source of its payment, and is equivalent to a devise or bequest of so much or such a part of the fund or thing specified.

3. SAME—GENERAL.

Testator devised his homestead farm, constituting nearly the whole of his estate, to two sons jointly. To four other children he gave each the sum of \$500 in cash, which sums were to be taken as in full of their respective interests in the farm. The will recited that the said devises and bequests were to be considered as the disposition of the homestead farm among testator's children, and should not affect any other interest or estate. *Held*, that the legacies were general, rather than specific or demonstrative.

4. SAME—ADEMPTION.

The testator having in his life-time paid to each of said legatees \$500, furnished by the devisees of the farm, taking a receipt from each legatee showing that the payment was in consideration of the interest of said legatee in the farm under the will, the legacies were thereby adeemed.

5. SAME.

An ademption of a general legacy results where a parent, or other person standing *in loco parentis*, after having made the bequest, gives a portion to the child to whom the bequest is made, equal to or in excess of the amount bequeathed, the portion given and the legacy being *ejusdem generis*.

6. SAME—MARRIED WOMEN.

The fact that one of the legatees was a married woman when she received the money and executed the receipt is immaterial, as the ademption results, by operation of law, from the receipt of the money in testator's life-time from the source contemplated by the will, and not by force of any contract.

adeemed, the legatees, William G. Eldridge and others, appeal.

C. F. McNutt and *Stimson & Stimson*, for appellants. *S. C. Davis* and *S. B. Davis*, for appellee.

MITCHELL, J. After the issues were joined in the court below, the judgment appealed from was rendered upon an agreed statement of facts. The questions for decision arise out of the facts agreed upon, which, so far as they are material, are as follows: In November, 1863, William B. Eldridge executed his last will and testament, by the second clause of which he devised to his sons Hamilton Eldridge and Abram A. Eldridge his homestead farm, to be held by them jointly. To his daughters, Amanda and Cynthia, and to his sons William G. and Robert B., he bequeathed \$500 each, to be paid in cash, which sums were to be taken and considered as in full of each of their respective interests in the homestead farm. The will contained a recital, the effect of which was that the devises and bequests thus made were to be considered as the disposition of the homestead farm among the testator's children, and were not to affect any other interest or estate. Afterwards, and during the life-time of the testator, his sons Hamilton and Abram A. Eldridge, devisees of the homestead farm, furnished their father \$2,000 in money, out of which he paid to each of the four legatees above named the sum of \$500, and received from each a receipt of the following tenor, viz.: "Received of William B. Eldridge, \$500, in consideration of my interest in his homestead farm, corresponding with his last will." One of the daughters was a married woman at the time she received the money and executed the receipt therefor, as above. The testator died in February, 1881, having had but the six children named above. He had only about \$500 in value of personal property, which, with the farm above mentioned, valued at about \$6,400, comprised his whole estate.

On behalf of the administrator with the will annexed, it is insisted that the sums paid to the several legatees by the testator in his life-time constituted a satisfaction or ademption of the legacies provided by the will, while the legatees insist that the legacies are specific or demonstrative in

Appeal from circuit court, Vigo county; JOSHUA JUMP, Special Judge.

Action by Hugh D. Roquet, administrator *c. t. a.*, etc., of William B. Eldridge, deceased, against William G. Eldridge and others, heirs, devisees, and legatees of said decedent, to settle the estate. From a judgment declaring certain legacies

their character, and that since it does not appear that the money paid them was raised out of, or derived from, the land comprised in the homestead farm, the payment did not work an ademption of the sums bequeathed by the will. The legacies were, however, neither specific nor demonstrative. Speaking upon the subject of specific legacies, the lord chancellor in *Fielding v. Preston*, 1 De Gex & J. 438, said: "There have been attempts in various cases to determine the meaning of a specific legacy, and what is the test whereby such legacies may be distinguished from general bequests. There are objections to most of the definitions, but I think we are quite safe in treating that as a specific bequest which the testator directs to be enjoyed *in specie*." A legacy is specific when it can be satisfied only by the transfer or delivery of some particular portion of or article belonging to the estate, which the testator intended should be transferred to the legatee *in specie*. 2 Redf. Wills, 122; 2 Rap. & L. Law Dict. tit. "Legacy." Lord HARDWICKE said, in *Ellis v. Walker*, Amb. 309: "The court leans against considering legacies as specific." Unless, therefore, it appears that the money or thing to be transferred is so clearly identified and inherently described as that the legatee can say to the executor that all or a portion of the very fund or property in question was transferred by the will, the bequest will not be regarded as specific. *Sidebotham v. Watson*, 11 Hare, 170.

While it is true the doctrine of ademption does not apply to specific devises or legacies, as a general rule, (*Swails v. Swails*, 98 Ind. 511,) yet, even in case of a specific devise or bequest, if the very thing devised or bequeathed had been transferred to the devisee or legatee in the life-time of the testator, so that there would be nothing left for the will to operate upon, an effectual ademption would have taken place.

Accepting the foregoing as the true criterion of a specific legacy, it becomes clear that the bequest of \$500 in cash to each of the sons and daughters named, and the further direction that this was to be considered in full of their respective interests in the homestead farm, and that the devisees and bequests previously made were not to affect any other interest or estate, did not constitute a specific bequest of any portion of the testator's estate to be transferred *in specie*. Neither did the legacies belong to that intermediate class which are sometimes denominated "demonstrative," and which are peculiar, in that they are not ordinarily liable to be adeemed or abated by an advancement made in a general way. "A demonstrative legacy is a bequest of a sum of money payable out of a particular fund or thing. It is a pecuniary legacy, 'given generally, but with a demonstration of a particular fund as the source of its payment.' It is therefore equivalent to, or in the nature of, a devise or bequest of so much or such a part of the fund or thing specified." *Glass v. Dunn*, 17 Ohio St. 413; 5 Amer. & Eng. Enc. Law, 541; 2 Redf. Wills, 140, 141.

While it is quite true the will plainly indicates that the sums bequeathed to the

sons and daughters named were to be taken in full of their respective interests in the homestead farm, which was specifically devised to the two other sons named in the will, there is no direction that the bequests are to be paid out of any particular fund, or that the fund out of which payment is to be made is to be derived from the rents, issues, or profits of the land, or that the legatees are to have any interest, as such, in the land itself. The implication is that the bequests were chargeable against the devisees of the land, or, at most, that they should be chargeable upon the farm. Moreover, since it appears by the agreed statement of facts that the sons to whom the homestead farm was devised furnished the money with which the legacies were paid, it is not apparent why this should not be held to satisfy the bequests, even though it should be conceded that they were payable out of the land. If thus payable, it must have been contemplated that the amount should constitute a charge upon the farm, to be removed by the devisees at some time, by paying the several amounts to the legatees. We know of no authority which would justify a holding that a general legacy which is payable out of a particular fund, or in a specified manner, may not be satisfied, in case the legatee receives the amount thereof from the testator in his life-time, out of the very fund devoted to the payment of the bequest, provided it clearly appears that the amount was given and received with the intention that it should work an ademption of the legacy. If we assume that the homestead farm was to be the source from which the fund was to be derived, out of which the legacies were payable, the conclusion follows that the devisees of the farm were to take it subject to the burden of paying the legacies after the testator's death. Having furnished the money to the testator during his life-time with which to pay off the bequests, and the money having been paid to the legatees and received by them for that purpose, the legacies are effectually satisfied from the very source contemplated by the will. An ademption results where a parent or other person standing *in loco parentis*, after having made a bequest, gives a portion to the child to whom the bequest is made, equal to or in excess of the amount bequeathed, the portion given and the legacy being *ejusdem generis*. *Weston v. Johnson*, 48 Ind. 1. Within the rule thus stated the legacies were adeemed.

Whether a legacy be specific or demonstrative, if it clearly appears that the particular thing or fund bequeathed has been irrevocably delivered over to the legatee in the life-time of the testator, the legacy is adeemed because the testator's title to the thing or fund has been divested by the gift, and has become vested in the legatee during the life-time of the testator. *Clayton v. Akin*, 38 Ga. 320.

The fact that one of the legatees was a married woman at the time she received the money from her father and signed the receipt is of no consequence. The receipt of the money from the source contemplated by the will satisfied the legacy by operation of law, and not by force of any con-

tract. Money paid to a married woman in ademption of a legacy produces the same legal result as if she were unmarried. There was no error. The judgment is affirmed, with costs.

(37 N. J. Eq. 118.)

WYCKOFF V. PERRINE'S EX'RS.

(Court of Chancery of New Jersey. May Term, 1883.)

1. CONSTRUCTION OF WILLS.

In construing a will, the court must always have regard to the circumstances, situation, and surroundings of the testator.

2. SPECIFIC LEGACIES.

In order to make a legacy specific, some form of expression must be used in the will which clearly indicates a purpose on the part of the testator to give a specific thing, and nothing else. There may be a specific legacy of a debt which is owing to the testator, as where the identical debt is clearly designated in the will as the exclusive subject intended to be given by the testator.

3. ADEMPMENT.

Where the subject of a specific legacy is disposed of after the will is made, so that it does not exist *in specie* at the testator's death, or is so changed that it cannot be called the same thing, the bequest fails, and the legatee is not entitled to money in lieu thereof. The motives and intentions of the testator in destroying the subject of the bequest, or changing its form, cannot be considered. Where the legacy is of a debt, payment of the debt to the testator makes an end of the legacy, and the question whether the payment was voluntary or compulsory is immaterial.

4. SAME.

Testator by his will provided as follows: "Whereas, my son-in-law D. borrowed of me the sum of \$2,300, * * * now it is my will, in order to do equal justice to and between my children, that the same shall be considered and taken as so much of the share of his wife, E., of my estate; and I give and bequeath to my said daughter, E., the further sum of \$500, which is to be in full of her share of my estate; and I make no further provisions for the said E. in this, my last will." At the time the will was made, D. had, to testator's knowledge, been adjudged a bankrupt, and testator knew also that most of this debt was hopelessly lost. Afterwards testator proved his debt, and received two dividends, amounting to \$508.12. D. received his discharge before testator's death. Held, that the testator's intention was to treat the debt of his son-in-law as an advancement to E., and for that purpose he gave her the debt; that this gift of the debt constituted a specific legacy; that it was adeemed; and that E. took under the will only the second legacy given to her, of \$500.

On demurrer to bill.

Bill filed by Elizabeth Wyckoff against the executors, etc., of Matthias M. Perrine, deceased, to recover legacy.

Barker Gummere, for demurrants. *Alan H. Strong*, for complainant.

VAN FLEET, V. C. This is a suit for a legacy. The defendants have demurred to the complainant's bill, denying that on the case made by it she is entitled to relief. The complainant is a daughter of Matthias M. Perrine, who died testate in the month of October, 1878. She grounds her right of action on the following clause of her father's will: "Whereas, my son-in-law David B. Wyckoff borrowed of me the sum of twenty-three hundred dollars,

which sum I loaned him on interest, now, it is my will, in order to do equal justice to and between my children, that the same shall be considered and taken as so much of the share of his wife, Elizabeth, of my estate; and I give and bequeath to my said daughter Elizabeth the further sum of five hundred dollars, which is to be in full of her share of my estate; and I make no further provisions for the said Elizabeth Wyckoff in this, my last will and testament." The \$500 have been paid. The debt of David B. Wyckoff to the testator was evidenced by a promissory note, dated April 1, 1874, and payable one year after date. A petition in bankruptcy was filed against Wyckoff on the 3d day of May, 1876, on which he was subsequently, in the language of the bill, in due course of law, adjudged a bankrupt. He was discharged on the 2d of April, 1878. The testator proved his debt, and received two dividends out of the bankrupt assets,—the first June 15, 1877, of \$384.50; and the second March 14, 1878, of \$123.62,—making a total of \$508.12. The will bears date May 28, 1877. It was executed, it will be observed, more than a year after the commencement of the proceedings in bankruptcy, and less than three weeks before the testator received the first dividend.

The complainant contends that the legacy given by the clause under consideration is not specific, but demonstrative; in other words, properly construed, the clause means this: that she is, under any circumstances, to have a legacy of \$2,300, the reference to the debt of her husband being intended simply to indicate the fund which should be applied primarily to its payment. Such a construction would, I think, not only do violence to the language used by the testator, but would attribute to him a purpose certainly not expressed, and probably never entertained. No gift is made by express words, but an intention to give is very clearly expressed by words of direction or command.

There can be no doubt that the thing which was before the testator's mind when he made his will, as the subject of the gift to the complainant, was a debt. He tells who the debtor was,—his son-in-law David Wyckoff; how he incurred the debt,—for borrowed money; the amount of the debt,—\$2,300; the terms on which it was held,—loaned on interest; and then he says: "Now, it is my will, in order to do equal justice to and between my children, that the same [that is, the debt due to me from my son-in-law] shall be considered and taken as so much of the share of his wife, Elizabeth, of my estate."

In construing a will, the court must always have regard to the circumstances, situation, and surroundings of the testator. At the time this will was made the son-in-law had been adjudged a bankrupt. The testator knew it. He knew, also, that the greater part of his debt was hopelessly lost; and for that reason, unquestionably, he thought it was his duty, in order that justice might be done to all his children, to treat the debt of his son-in-law as an advancement to his daughter, and to effect that purpose he gave her the debt. He intended to say by the pro-

vision under consideration, as I think he has quite clearly said: "I want each of my children to have an equal share of my estate. The husband of my daughter Elizabeth borrowed of me, some time ago, \$2,300, which he cannot repay. In order to be just to my other children, I give Elizabeth the debt I hold against her husband, as part of her share, and the further sum of five hundred dollars, but she is to have nothing more." In deciding whether a legacy is specific or general, the intention of the testator must control, as it must the decision of every other question involving the construction of wills. There is no technical, arbitrary rule requiring the use of particular words or expressions to make a bequest specific. Such intention may be manifested either by clear words, or by the general scope and texture of the instrument; but in the latter case, in the language of Lord ELDON, the inference should rest upon a strong, solid, and rational interpretation of the will.

The rule of construction to be observed in such cases is thus stated by ROPER: "A court of equity leans to the consideration that all bequests are general; it therefore requires expressions actually bequeathing the identical debt, or such reference to it, appearing upon a strong, solid, and rational interpretation of the will, as to raise a plain inference that the debt was the exclusive subject intended to be given by the testator to the legatee." 1 ROP. LEG. 234. In *Norris v. Thomson*, 16 N. J. Eq. 218, Chancellor GREEN held that, in order to make a legacy specific, there must be something on the face of the will to individuate the thing given, or some form of expression must be used which clearly indicates a purpose on the part of the testator to give a specific thing, and nothing else. Here just such a condition of affairs exists. The testator has marked out, with great clearness and precision, just what the complainant is to take,—she is to have the debt of her husband and \$500; and then he declares she is to have nothing more. That such was his intention seems to me to be so obvious as to leave the complainant without any substantial ground upon which to rest the opposite contention. The words of exclusion must, I think, be regarded as furnishing an almost infallible test of the meaning of the testator.

The case involves another question: Has the legacy been adeemed? It is certain the debt which was the subject of the legacy did not exist at the time of the testator's death. So much of it as had not been paid to the testator out of the bankrupt's assets was extinguished by his discharge in bankruptcy, so that the subject of the gift did not exist at the testator's death. Some of the earlier decisions made a distinction between the effect of a voluntary payment and a compulsory payment of a debt, which was the subject of a specific legacy, in adeeming the legacy. They held that, where the debtor came forward of his own volition, and without solicitation, and paid the debt in the testator's life-time, the testator's acceptance of the money, under such cir-

cumstances, did not indicate an intention to take back the legacy; but if he, of his own will, and in the absence of any other apparent reason than that he wanted the debt paid, constrained the debtor to pay, then his act was regarded as evincing an intention to adeem the legacy. This distinction was recognized by the supreme court in *Stout v. Hart*, 7 N. J. Law, 414, 424. It was there said: "A voluntary payment is not an adeemption, because accepting the money when tendered does not imply any alteration in the intentions of the testator; but when the testator compels payment this fact may or may not amount to an adeemption, according to circumstances." The cases adopting this distinction as the rule of judgment will be found collected in 2 White & T. Lead. Cas. Eq. (4th Amer. Ed.) 624. The distinction, however, no longer prevails. The modern decisions, both of this country and England, with almost perfect unanimity, repudiate it as unsound and fallacious. The rule now generally recognized as an accurate statement of the law on this subject is that laid down by Lord THURLOW in *Humphreys v. Humphreys*, 2 Cox, Ch. 185. He said: "The only rule to be adhered to is to see whether the subject of the specific bequest remained *in specie* at the time of the testator's death, for, if it did not, then there must be an end of the bequest; and the idea of discussing what were the particular motives and intentions of the testator in destroying the subject of the bequest would be productive of endless uncertainty and confusion." Chief Justice BLACK states the same rule, as follows: "If a thing bequeathed in a will, by such description as to distinguish it from all other things, be disposed of, so that it does not remain at the testator's death, or if it be so changed that it cannot be called the same thing, the bequest is gone. If such a legacy be of a debt, payment necessarily makes an end of it. The legatee is entitled to the very thing bequeathed, if it be possible for the executor to give it to him, but, if not, he cannot have money in the place of it. This results from an inflexible rule of law applied to the mere fact that the thing bequeathed does not exist, and it is not founded on any presumed intention of the testator." *Hoke v. Herman*, 21 Pa. St. 301, 305. The cases repudiating the distinction alluded to are too numerous to be cited. They will be found referred to in 2 Williams, Ex'rs, (6th Amer. Ed.) 1323; 2 White & T. Lead. Cas. Eq. (4th Amer. Ed.) 623, 668; *Theob. Wills*, 121; *Redf. Wills*, 423. The question now is one of identity, and not of intention, as gathered from matters extrinsic the will. In such cases the test is, did the subject of the gift exist *in specie* at the testator's death? If it did, the legatee is entitled to it against all persons except creditors; if it did not, he is not. Trying the complainant's right to relief by this principle, it is clear that judgment must be awarded against her.

The demurrer must be sustained, with costs.

In *MULLINS v. SMITH*, 1 Drew. & S. 204, KIDDERLEY, V. C., says: "The points of difference

between specific and demonstrative legacies are these: A specific legacy is not liable to abatement for the payment of debts, but a demonstrative legacy is liable to abate when it becomes a general legacy by reason of the failure of the fund out of which it is payable. A specific leg-

acy is liable to ademption, but a demonstrative legacy is not. A specific legacy, if of stock, carries with it the dividends which accrue from the death of the testator, while a demonstrative legacy does not carry interest from the testator's death."

(See, also, *Tomlinson v. Bury*, 145 Mass. 346, 14 N. E. Rep. 137; *Cowles v. Cowles*, 56 Conn. 240, 13 Atl. Rep. 414; *Tift v. Porter*, 8 N. Y. 516; *Loring v. Woodward*, 41 N. H. 391; *Hayes v. Hayes*, 45 N. J. Eq. 461, 17 Atl. Rep. 634; *Starbuck v. Starbuck*, 93 N. C. 183.)

(L. R. 8 App. Cas. 812.)

ROBERTSON *et ux.* v. BROADBENT *et al.*

(House of Lords. July 23, 1883.)

1. PECUNIARY LEGACIES, HOW PAID.

Pecuniary legacies, in the absence of any sufficient indication of a contrary intention, are payable out of the personal estate not specifically bequeathed, the presumption being that the testator intends them to be so paid, and that he intends specific legacies to pass unconditionally and *in specie* to the persons to whom they are given. Pecuniary legacies are, moreover, not payable out of the real estate, unless charged upon it by the will.

2. SPECIFIC LEGACIES—NATURE OF.

Anything which a testator, identifying by a sufficient description, and manifesting an intention that it should be enjoyed or taken in the state and condition indicated by that description, separates in favor of a particular legatee from the general mass of his personal estate, is a specific legacy.

3. SAME—GENERAL GIFT LIABLE FOR PAYMENT OF PECUNIARY LEGACIES.

A gift, in general terms, of the whole personal estate to which a testator may be entitled at the time of his death, is not a specific legacy, and is not, therefore, exempt from being applied to the payment of pecuniary legacies, if there are any such legacies in the will besides this general gift, unless the testator has clearly manifested his intention in the will that there shall be such an exemption. *Dictum* in *Jones v. Bruce*, 11 Sim. 221, 223, overruled.

4. SAME—EXCEPTION FROM GENERAL GIFT.

The exception of something specifically described from a gift (otherwise general) of the personal estate of testator cannot make that gift more specific than it would be if there were no such exception. The excess, over and above what is excepted, is still a general gift, and may be applied to the payment of pecuniary legacies.

5. SAME—ABATEMENT.

A testator by his will, after directing his executors to pay all his just debts and funeral and testamentary expenses, and giving various pecuniary legacies to individuals and to charities, gave all his personal estate and effects of which he should die possessed, and which should not consist of money or securities for money, to R. absolutely. All the rest, residue, and remainder of his estate, both real and personal, he devised to his executors upon certain trusts, and it was provided that the legacies for charitable purposes should be paid exclusively out of such part of his personal estate as might lawfully be appropriated to such purposes, and preferably to any other payment thereout. *Held*, that the legacy to R. was not specific, and was not exempt from the payment of the pecuniary legacies.

Appeal from the court of appeals, (20 Ch. Div. 676.)

Henry Ovey, by his will dated June 1, 1881, appointed John Barrow and John Herbert Greenhalgh (two of the respondents) executors and trustees; and after directing his executors to pay all his just

debts, and funeral and testamentary expenses, and giving to various individuals and charities various sums, amounting to £48,600, proceeded thus: "I give all my personal estate and effects of which I shall die possessed, and which shall not consist of money or securities for money, unto the said Elizabeth Anne Robertson, for her own use and benefit absolutely. I give and devise all the rest, residue, and remainder of my estate, both real and personal, whatsoever and wheresoever, to the said John Barrow and John Herbert Greenhalgh; upon trust thereout, in the first place, to pay to Alfred Greenhalgh, of 30 Holborn, London, the sum of five hundred pounds sterling; and to R. L. Bloomfield, of Brighton, aforesaid, secretary to the said Tindal Robertson, the sum of one hundred pounds sterling for the use of his school, in such manner as he shall think fit, in his uncontrolled discretion; and as to the residue thereof, or such part or parts thereof as may be lawfully appropriated to the purpose, for such one or more or any hospital of a charitable nature, and in such proportions as they, in their uncontrolled discretion, shall think fit. I direct that all the legacies given by this, my will, shall be paid free of legacy duty; and also that the aforesaid money legacies for charitable purposes shall be paid exclusively out of such part of my personal estate as may lawfully be appropriated to such purposes, and preferably to any other payment thereout." The testator having died, this action was brought by Broadbent and others of the respondents against the executors for the administration of his real and personal estate. The pecuniary legacies amounted to £49,200, of which £7,500 were in favor of charitable institutions. The personal estate was valued under £39,660, and the real estate at about £20,000. Upon a summons for the redelivery to the executors of certain chattels which had been given up to the appellant, Elizabeth Anne Robertson, *Fay, J.*, being of opinion that the legacy to her of all the testator's personal estate, and effects of which he should die possessed, and which should not consist of money or securities for money, was a specific legacy, made no order, except as to costs. On appeal, the court (JESSEL, *M. R.*, and LINDLEY and HOLKER, *L. JJs.*, 20 Ch. Div. 676) made an order, May 3, 1882, declaring, *inter alia*, that the legacy was not specific, and that all the pecuniary legacies were payable in full before Mrs. Robertson could be entitled to anything under the bequest to her, without prejudice to any question, as between her and the testator's heir at law, as to the liability of

the real estate to the payment of such pecuniary legacies in priority to the property bequeathed to her.

Mr. Macnaghten, Q. C., (Decimus Sturges, with him,) for appellants. Mr. Fischer, Q. C., (Mr. Stirling, with him,) for the pecuniary legatees, respondents. Cecil Russell, (with him, Sir H. James, A. G.,) for the Attorney General, respondent. Borthwick, for the executors, respondents, was not heard.

SELBORNE, L. C. My lords, the question on this appeal is whether the general personal estate of the testator, Henry Ovey, given to the appellant Mrs. Robertson, is exempt from or subject to the payment of pecuniary legacies. The general rule of law as to pecuniary legacies (in the absence of any sufficient indication of a contrary intention) is that they are payable by the legal personal representatives of the testator (in whom the whole personal estate vests by law) out of the personal estate not specifically bequeathed. The presumption is that the testator intends them to be so paid. Unless charged upon it by the will, they are not payable out of the real estate. The principle of the exemption of personal estate specifically bequeathed is that it is necessary to give effect to the intention apparent by the gift. If the bequest is of a particular chattel, such as a horse or ship, it is manifest that the testator intended the thing to pass unconditionally, and *in statu quo*, to the legatee; which could not be if it were subject to the payment of funeral and testamentary expenses, debts, and pecuniary legacies. As against creditors, the testator cannot wholly release it from liability for his debts; but, as against all persons taking benefits under his will, he may. The same principle applies to everything which a testator, identifying it by a sufficient description, and manifesting an intention that it should be enjoyed or taken in the state and condition indicated by that description, separates, in favor of a particular legatee, from the general mass of his personal estate,—the fund out of which pecuniary legacies are, in the ordinary course, payable.

This reasoning does not apply to a gift, in general terms, of the whole personal estate to which a testator may be entitled at the time of his death. 1 Rep. Leg. (4th Ed.) pp. 242, 243; *Fairer v. Park*, 3 Ch. Div. 312; *Onseley v. Anstruther*, 10 Beav. 453. It is, of course, in the power of any testator, if he so pleases, to direct that his pecuniary legacies (and also his debts, etc., if he sufficiently provides for their payment) shall be exclusively charged on his real estate, or on any particular property, real or personal, which he may think fit. *Lance v. Aglionby*, 27 Beav. 65; *Jones v. Bruce*, 11 Sim. 221, 228. But an intention to do so must be discoverable from the terms of his will. In the cases last cited, such an intention was sufficiently clear without any aid from the presumption applicable to specific legacies as such. It is true that in *Jones v. Bruce*, 11 Sim. 221, 228, Sir LANCELOT SHADWELL said that the gift of the whole personal estate was as specific as if the testator "had enumer-

ated every chattel, and then said, 'I give them to my wife.'" But that *dictum* was not necessary for the decision; nor can I reconcile it (if his honor really intended to say that this, without more, would have been enough to exonerate the personalty, in the absence of any other provision for the large pecuniary legacies there in question) with either principle or authority. If that gift had been to the wife for life, with remainder over, the personal estate must have been converted into money and invested, and she would not have been entitled to enjoy it *in specie*, under the doctrine of *Howe v. Earl of Dartmouth*, 7 Ves. 137, and other cases of that class.

In the present will there is nothing from which an intention to exempt the general personal estate bequeathed to Mrs. Robertson from its ordinary burdens, or to give it the quality (in that respect) of a specific bequest, can be inferred, unless it be one or the other, or the combination, of these two circumstances: (1) That the "money, and securities for money," of which the testator might be possessed, are excepted from the gift; and (2) that it is followed by another gift of "all the rest, residue, and remainder" of the testator's estate, "both real and personal," (to the persons who are appointed executors at the outset of the will,) upon trust, to pay thereout two legacies, and to dispose of the rest for charitable purposes. The gift in question to Mrs. Robertson is preceded, first, by a direction to the executors to pay all the testator's debts and funeral and testamentary expenses as soon as conveniently may be after his death, and then by a great number of pecuniary legacies, amounting together to £48,600, of which £7,500 are for charitable objects, and £2,000 for Mrs. Robertson herself. The testator has nowhere said that his funeral and testamentary expenses and debts, or his pecuniary legacies, are to be paid in any other way than that in which they would be payable according to the ordinary course of law. It is contended that this consequence results from the residuary form of the gift which follows, as compared with the gift to Mrs. Robertson, which is not in form residuary; "residue" being that which remains of the estate after all necessary deductions, and after satisfying all prior gifts. The court of appeal appears to have thought that the excepted personalty would be primarily liable to the funeral and testamentary expenses, debts, and pecuniary legacies; but they decided that there was no exemption from those charges of the personalty given to Mrs. Robertson. As to the real estate nothing was determined. With this view I agree. I think that the exception of something specifically described from a gift (otherwise general) of the personal estate cannot make that gift more specific, in the proper sense of the term, than it would be if there were no such exception. It is indisputable that this testator intended his pecuniary legacies to be paid in full, free of legacy duty; and he expressly directed that such of them as were for charitable purposes should be paid exclusively "out of such part of his personal estate as might lawfully be appropriated

to such purposes, and preferably to any other payment thereout." These words, in their natural sense, extend to every part of his personal estate which might lawfully be so appropriated, whether included or not included in the gift to Mrs. Robertson; and give the charitable legacies, as against the whole pure personality, a preference over every other payment, and therefore over any payment to Mrs. Robertson. This could not have been disputed if the whole personal estate had been given to Mrs. Robertson. But the fact that "money," (which might and probably would, at the time of the testator's death, be quite insufficient,) and "securities for money," (which might be mortgages, or other securities savoring of realty,) are excepted, cannot reduce the right of the charitable legatees (in the event of Mrs. Robertson surviving the testator, as she did) to a charge upon such, if any, of those excepted things only as might consist of pure personality. A gift which is subject to legacies, so far as relates to the charitable legatees, cannot, under the terms of this will, have a different character as to the other pecuniary legacies.

The order appealed from is, in my opinion, right, and I move your lordships to dismiss this appeal, with costs.

LORD BLACKBURN. My lords, at the close of the argument in this case I had not much doubt that the order appealed against was right, and that the appeal must be dismissed; but I was glad to have time to look at and consider the authorities cited, as the course of my practice as a barrister, and afterwards as a judge in a court of common law, did not make me familiar with this branch of law, which was principally administered in the courts of equity. A testator cannot deprive his creditors of their right to be paid their debts out of his assets, but, subject to their rights, he may dispose of the surplus as he pleases. I do not complicate the question by saying anything as to real estate. I suppose the case of a man having personal property only, such as chattels real, ships, stocks, goods, and money. If he, by his will, leaves legacies, the executor, who takes all the personal estate, must first pay the debts and other charges on the testator's estate, and then, as far as he has assets, pay the legacies. If he has enough to do so in full, no question arises. But if, either from the testator having overestimated his pecuniary means, or having underestimated his liabilities, there is not enough to pay the whole in full, all the legatees cannot be paid as much as the testator intended; and the question arises whether some of the legacies are to bear the loss, before the others are abated at all, and then the others, if there is still a deficiency, are to be abated ratably. Sometimes a testator foresees this possibility of a deficiency, and provides for it. This was done by codicil in *Farmer v. Mills*, 4 Russ. 86. When a testator does so, there can be no doubt about it; his expressed intention governs. Sometimes, after giving legacies to a large amount, he leaves the residue to someone.

It does not need authority to show that in such a case the residuary legatee can take nothing until all the other legacies are paid in full, for till then there is no residue. But, in the absence of something to show an intention on the part of a testator to the contrary, he must be taken to intend all his legacies to be paid in full; and, if that is impossible, all are to be reduced ratably, unless there is something to show the intention of the testator that one or more of the legacies are to be paid in full, though the consequence may be that the others are to be the more reduced, or perhaps not paid at all.

Let us suppose that a testator leaves his library, such as it should be at the time of his death, to A., £10,000 to B., and the residue of his personal estate to C., very probably believing, perhaps even indicating on the face of his will, that he thought his library would be worth £10,000, and the whole of his personal estate, including all library, worth £50,000; and owing either to miscalculation on his part, or to unforeseen disasters, his personal estate, including his library, turns out, after all debts and charges are paid, to be £19,000 only. No one can doubt that the testator, if alive, would remodel his will, and give something to C., perhaps burdening the library with a payment to C., and reducing the legacy to B., so as to get the means of giving something to C. But he is dead, and the court cannot make a will for him. C., hard as it may seem, can get nothing under the bequest of the residue, for there is no residue; and it is settled by decisions, and I think, if it was *res integra*, I should hold, that, as the intention on the face of the will is that A. should have the library, as a specific thing, such as it should be at the testator's death, he must have it, whether it is of more or less value than the testator supposed, and that B. can only get the £9,000. It is, as I think, on this ground, and on this principle, that, where there is a deficiency, the first to suffer is the residuary legatee. Then, if there still be a deficiency, the general legatees, and then the specific legatees. I think that, in considering the case below, more has been said as to the definition of what is a specific bequest, as if it were a technical question, than was quite requisite for the decision of the case. I do not know, if it were necessary to give a definition of a "specific legacy," that any would come nearer to my idea than what has just been said by the lord chancellor in this case,—"something which a testator, identifying it by a sufficient description, and manifesting an intention that it should be enjoyed in the state and condition indicated by that description, separates, in favor of a particular legatee, from the general mass of his personal estate." I do not, however, like to bind myself even to saying that this is a precise definition. I think the real question is, what is the true construction of the will of this testator, by which, after giving large pecuniary legacies, some to charities and some to individuals, among whom is Mrs. Robertson herself, of £2,000,—though I do not think that material,—he proceeds thus: [His lordship read the

extract from the will set out ante, p. 71.]

I think this is really a bequest of all the residue of his estate to Mrs. Robertson and the two trustees, the trustees to take the real estate, and the money, and securities for money, and Mrs. Robertson all the rest of the personal estate; and that there is nothing on the face of the will to indicate any intention that either she or the trustees were to take that property in the state and condition in which it should be at his death.

It was argued that the testator probably was thinking of the furniture, farm stock, etc., at Royden Lodge, which formed the bulk of his personal estate not consisting of money or securities for money, and that he really meant to give her those, to be enjoyed in the same state and condition in which he left them. It is possible he did, but he has not said so in his will. He has, no doubt, left her those, and his wine in London, and a steam-launch, and two boats, and a leasehold stable in London, which it is less probable that he meant to be enjoyed in the same state and condition in which he left them. But it all comes round to the same thing. The court cannot make a will for the testator; it must construe the will he has made. And I think that the bequest of the residue of his effects which shall not consist of money or securities for money to Mrs. Robertson, and the residue of his personal estate to the two trustees, is one residuary bequest to two persons.

I have spoken as if there had been no real estate, though, in fact, there was a considerable real estate. I have done so because, the heir not being before the court, it cannot now decide what portion of that real estate is available to pay the legacies, and ought to be so applied in relief of this residuary bequest. It may possibly be that the solution of the questions between Mrs. Robertson and those entitled to the real estate, which are reserved by the order, will render the present decision of no practical consequence. It is possible that it will leave it of great consequence. All I now say is that I think it rightly decided by the order appealed against.

LORD FITZ GERALD. My lords, I concur in the judgment of the lord chancellor, and adopt his reasons. The gift is to be read as a bequest to the trustees of the money and securities for money of which the testator should die possessed, and of all the residue of his personal estate and effects to Mrs. Robertson for her own use and benefit, absolutely. The gift is not specific, within the definition so carefully expressed by the lord chancellor, and there is nothing in the will to indicate any intention of the testator to exempt the subject of that bequest from its ordinary liabilities. There is much in the will leading to a contrary conclusion, and which the lord chancellor has already pointed out. I think the order appealed from is correct.

Order appealed from affirmed, and appeal dismissed, with costs.

(See, also, *Keiper's Appeal*, 124 Pa. St. 193, 16 Atl. Rep. 744; *Georgia Infirmary v. Jones*, 37 Fed. Rep. 750; *Slade v. Walpole*, 61 Law T. (N.S.) 497; *Langdon v. Astor's Ex'rs*, 16 N. Y. 9; *Beck v. McGillis*, 9 Barb. 38; *Richards v. Humphreys*, 15 Pick. 133; *Ashburner v. Macguire*, 2 Brown, Ch. 108.)

(43 N. J. Eq. 143, 10 Atl. Rep. 546.)

DUNCAN v. INHABITANTS OF TOWNSHIP OF FRANKLIN.

(*Prerogative Court of New Jersey*. May Term, 1887.)

1. ABATEMENT OF LEGACIES — CONSIDERATION OF GENERAL LEGACY.

Where general legatees are volunteers, taking of the testator's bounty, and there is nothing in the will to indicate that one shall be paid before another, their legacies must abate proportionately, in case of a deficiency of assets; but where a general legacy is sustained by a valuable consideration, such as the relinquishment of a debt or of a claim of dower, and the right to the claim, constituting the consideration, subsists at the testator's death, the legatee is entitled to full payment of his legacy in preference to other general legatees who take merely of the testator's bounty.

2. SAME — PRIORITY OF LEGACY — BURDEN OF PROOF.

The burden of proving that a general legacy is entitled to priority in payment is upon him who asserts it. The mere production of the will, by which a legacy was given in the following words, "I give and bequeath to Henry Benson Duncan, for his services, (in assisting me at different times,) the sum of two thousand dollars," and which was executed more than six years before the testatrix's death, does not, without other proof, sustain this burden.

Appeal from orphans' court, Essex county; KIRKPATRICK, JOHNSON, and LEEDWITH, Judges.

James M. C. Morrow, for appellant.
John A. Miller, for appellees.

MCGILL, Ordinary. Jane D. Poineer, by her will, dated September 27, 1875, and duly proved by the executors in it named, before the surrogate of Essex county, on April 6, 1882, after providing for the payment of her debts and funeral expenses, appointed the appellant, Henry B. Duncan, and one Hiram Van Winkle, executors of the will, and bequeathed several legacies, and among them one to the said Henry B. Duncan, in the following language: "Eighth. I give and bequeath to Henry Benson Duncan, for his services, (in assisting me at different times,) the sum of two thousand dollars." It appeared by the executors' account, filed with the surrogate on July 20, 1886, that the estate was insufficient to pay all the legacies in full, and also that the executors asked allowance for the payment of the legacy to Henry Benson Duncan by an item of discharge, as follows: "Paid Henry B. Duncan legacy under the will, for services rendered deceased in her life-time, as stated in the will \$2,000." To this item an exception

was filed. The executors did not offer proof that services had been in fact rendered by Mr. Duncan to the testatrix, for which an obligation to pay existed at her death, but relied entirely upon the will to justify their payment. The exception was sustained by the order of the orphans' court, and from such order this appeal is taken.

The established rule is that where general legatees are volunteers, taking of the testator's bounty, and there is nothing in the will to indicate that one shall be paid before another, their legacies must abate proportionately, in case of a deficiency of assets; but where a general legacy is sustained by a valuable consideration, such as the relinquishment of a debt or of a claim of dower, and the right to the claim, constituting the consideration, subsists at the testator's death, the legatee is entitled to the full payment of his legacy in preference to other general legatees, who take merely of the testator's bounty. *Williams, Ex'rs*, 1365; 1 *Rop. Leg.* 432; *Schouler, Ex'rs*, § 490, note; 2 *Redf. Wills*, 452.

The burden of proving that a general legacy is entitled to priority is upon him who asserts it, and the proof must be clear, conclusive, and unequivocal. *Titus' Adm'r v. Titus*, 26 N. J. Eq. 117; *Shepherd v. Guernsey*, 9 Paige, 357.

There is nothing in this bequest to Mr. Duncan, or in the will, to indicate that

the testatrix intended that this bequest should be paid before the other legacies. The expression, "for his services, (in assisting me at different times,)" does not, standing alone, import an indebtedness from her to the legatee, for which payment may be exacted by process of law. For aught that appears to the contrary, the services may have been rendered gratuitously, and the legacy may have been given in grateful recognition of them. That the legacy was given because of a sense of moral obligation, or as compensation for services, or other favors rendered as a mere voluntary courtesy, will not, if no legal obligation to pay exist at the death of the testatrix, constitute such a valuable consideration as to entitle the legacy to priority in payment. *Coppin v. Copplin*, 2 P. Wms. 291; *Turner v. Martin*, 7 De Gex, M. & G. 429; *Towle v. Swasey*, 106 Mass. 100.

More than six years elapsed between the making of the will and the death of the testatrix, yet no evidence was offered to show that, if a legal indebtedness to Mr. Duncan existed at the making of the will, its payment was enforceable when the testatrix died. The burden of proof, which was upon the executors, was not discharged by the simple production of the will. As the case is presented, no error in the order is shown.

The order will therefore be affirmed, with costs.

(See, also, *Appeal of Trustees of University of Pennsylvania*, 97 Pa. St. 187; *Knecht's Appeal*, 71 Pa. St. 334; *Towle v. Swasey*, 106 Mass. 100; *Titus' Adm'r v. Titus*, 26 N. J. Eq. 117.)

(24 N. J. Eq. 512.)

TINDALL'S EX'RS v. TINDALL.

(*Court of Errors and Appeals of New Jersey.*
June Term, 1873.)

LAPSED OR VOID LEGACIES—RIGHT OF RESIDUARY LEGATEE.

The residuary legatee in a will is entitled as well to a residue caused by a lapsed legacy, or by an invalid or illegal bequest, as to what remains after payment of debts and legacies. The only exception is that, where the words used show an intention on the part of the testator to exclude from the operation of the residuary clause certain portions of the estate, such intention must prevail. The use of words in a will giving the residue which remains, "after payment of debts and legacies," does not bring a case within the exception, but the general rule still applies, and, if a legacy lapses, it passes to the residuary legatee.

Appeal from the court of chancery.

Bill in chancery by William Tindall against John Manning and Edward Paxton, executors, etc., of Aaron Tindall, deceased, for one-eighth part of the sum of \$5,000, a lapsed legacy to testator's wife. Testator, after the above bequest to his wife, and several other legacies, bequeathed as follows: "I give and bequeath whatever of my property shall remain after payment of the above, and due settlement of all my business, to my two friends, John H. Manning and Edward Paxton." He appointed Manning and Paxton executors. Testator left no issue, but had eight brothers and sisters. Two of these (of whom the complainant is one) survived

him. The other six died before him. All left children living at the death of the testator. The defendant Paxton is one of these children. The case was argued before the chancellor upon bill and answer, who found for plaintiff, and defendants appealed.

I. W. Scudder, for appellants. *J. R. Emery*, for respondent.

DALRIMPLE, J. The question in this case is whether a certain lapsed legacy of \$5,000, given in and by the will of Aaron Tindall, deceased, falls into the residuum of the estate, and goes to the residuary legatees, or remains undisposed of, and is to be distributed among the next of kin of the testator. The will, after directing the payment of debts and funeral expenses, and the sale and disposition of all testator's property, real and personal, which he might own at the time of his decease, and the collection of the moneys due him, gives to his wife, Ann, in lieu of her right of dower at common law, the said legacy of \$5,000. After certain general legacies and bequests, the residuum of the estate is disposed of as follows: "I give and bequeath whatever of my property shall remain after payment of the above, and due settlement of all my business, to my two friends, John H. Manning, to him, his heirs and assigns, and to Edward Paxton, to him, his heirs and assigns." The residuary legatees are appointed executors. The testator having survived his wife, the legacy of \$5,000 to her lapsed. This suit is

brought by one of the next of kin of the testator, to recover a share of the legacy which has thus lapsed, and his right to recover is put upon the ground that, as to the \$5,000 in question, the testator died intestate.

The rule applicable to the question to be solved, as stated in the text-books, as well as in many adjudged cases, is that the residuary legatee is entitled as well to a residue caused by a lapsed legacy, or an invalid or illegal disposition, as to what remains after payment of debts and legacies. The only exception to the rule is that, where the words used show an intention on the part of the testator to exclude from the operation of the residuary clause certain portions of the estate, such intention, as gathered from the whole will, must not be defeated. Or the rule embracing the exception, as stated in some of the books, is that the residuary legatee must be a legatee of the residue generally, and not partially so only. The rule is so firmly established that citation of authority in its support is hardly necessary. I will, however, refer to the following text-books and adjudged cases: 2 *Rop. Leg.* 1672; 2 *Williams, Ex'rs*, 1313; *Easum v. Appleford*, 5 *Myne & C.* 56; *King v. Woodhull*, 3 *Edw. Ch.* 86; *James v. James*, 4 *Paige*, 117; *Banks v. Phelan*, 4 *Barb.* 90; *Cambridge v. Rous*, 8 *Ves.* 25; 2 *Redf. Wills*, 442.

The learned chancellor, in the court below, held that the case now before us came within the exception to the general rule, because the estate given was that which should remain after payment of the legacies before given. But I cannot see that this form of expression in any wise limits or restricts the extent of the gift. The clause would have had precisely the same meaning and effect if it had been, in terms, of the residue of the estate. All that the testator could give to his residuary legatees was what remained of his estate after payment of his particular debts and legacies. The legal effect is precisely the same, whether the one form or the other is adopted. The chancellor bases his opinion upon what he conceives to be the rule as laid down in 2 *Williams, Ex'rs*, p. 1315, and in 2 *Rop. Leg.* pp. 1679, 1682. He also cites the case of *Attorney General v. Johnstone*, Amb. 577. Exactly what Mr. Williams states the true rule to be is as follows: "The testator may, by the terms of the bequest, narrow the title of the residuary legatee, so as to exclude him from lapsed legacies; as when it appears to be the intention of the testator that the residuary legatee should have only what remained after the payment of the legacies." Mr. Roper states the exception to the general rule in the following language: "When the legatee is not generally, but only partially, residuary legatee, he will not, in that character, be entitled to any benefit from lapses, though very special words are required to take a bequest of the residue out of the general rule; as, first, when it appears the testator intended the residuary legatee should have only what remained after the payment of legacies." If these authors intend to say (which, to my mind, is by no means clear) that when

the clause of the will giving the residuum of the estate contains, or has annexed to it, the words, "after payment of debts and legacies," the settled rule of construction is that lapsed legacies are not embraced, but that as to them the testator is to be held as having died intestate. I cannot yield my assent to the proposition. The cases cited by the authors referred to do not support such a doctrine, while there are several well-considered cases to the contrary. Vice-Chancellor Woon, in the case of *Bernard v. Minshull*, Johns. Eng. Ch. 276, 299, says: "All you have to consider is whether the property is excepted, in order to take it away, under all circumstances and for all purposes, from the person to whom the rest of the property is given, or whether it is excepted merely for the purpose of giving it to some one else. If the latter, and the gift to some one else fails, the donees of all except this property are entitled to take the whole." In *Roberts v. Cooke*, 16 *Ves.* 451, it was held that a general disposition of personal estate, not theretofore specifically disposed of, comprehended specific legacies lapsed; the word "specifically" being held to mean "particularly." In the case of *King v. Woodhull*, 3 *Edw. Ch.* 79, 84, the form of the bequest was: "The residue and remainder of my estate, if any there shall be, after the payment of the said \$1,000 to the missionary society, I give and bequeath to the children of my niece." And it was held broad enough to embrace as well the legacy to the missionary society, which it was claimed was void, as a bequest to a mission school, which was held to be ineffectual. Vice-Chancellor McCoun in his opinion in that case says: "The words, 'after payment of debts and legacies,' or after payment of legacies specified or recapitulated in the residuary clause itself, are not restrictive of the bequest to any particular or partial residue; but the bequest, after all, is general of the remainder, and may be so understood without doing violence to the expressions of the will. Where the residuary clause is thus worded, the legatee is as much a general legatee of the residuum of the estate as if such words were not used." In *Shanley v. Baker*, 4 *Ves.* 732, the words were, all the rest and residue of my estate and effects "not by me hereinbefore particularly disposed of;" and they were held to embrace a leasehold property given as a legacy, which, by the statutes of mortmain, was void. To the same effect is the case of *Brown v. Higgs*, 4 *Ves.* 709. The case of *Attorney General v. Johnstone*, Amb. 577, was not decided upon the ground that the residuary bequest contained words of import similar to those now under consideration, for it did not; but the conclusion reached in that case was that, from the whole context of the will, it was evident that the testator did not intend that the void legacy should, in any event, become a part of the residuum of his estate. The syllabus of the case, which very well shows the point decided, is: "Residue, under particular circumstances, will not take in lapsed legacies;" the residue being given as a small remainder of about £100, and the lapsed legacies amounting to £20,000.

I have not been able to see anything in the residuary clause, when taken by itself, or in the context of this will now before us, which will authorize the result sought by the complainant. It seems to me quite evident that the testator did not intend to die intestate as to any part of his property. He gave the legacy of \$5,000 to his wife, to be accepted at her option, in lieu of her right of dower in his estate. If she should decline to accept it on these terms, or if, by reason of her death in the lifetime of her husband, it lapsed, the will of the testator, as ascertained from the well-

settled meaning of the words he has used, was that the lapsed or rejected legacy should go into and form part of the residue of his estate.

For the reasons above stated, the decree below must be reversed, and the complainant's bill dismissed, but without costs in this court or the court below.

For reversal: THE CHANCELLOR, BEASLEY, C. J., and BEDLE, CLEMENT, DALRIMPLE, DEPUE, GREEN, SCUDDER, VAN SYCKEL, and WOODHULL, JJ.

For affirmance: None.

(See, also, *Riker v. Cornwell*, 113 N. Y. 115, 20 N. E. Rep. 602; *Cruikshank v. Home for the Friendless*, 113 N. Y. 337, 21 N. E. Rep. 64; *Drew v. Wakefield*, 54 Me. 291; *In re Batchelder*, 147 Mass. 465, 18 N. E. Rep. 225; *Vandewalker v. Rollins*, 63 N. H. 460, 3 Atl. Rep. 625; *Massey's Appeal*, 88 Pa. St. 470.)

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END OF WILL.

INDEX.

ABATEMENT OF LEGACIES.

A gift, in general terms, of the whole personal estate to which a testator may be entitled at the time of his death, is not a specific legacy, and is not, therefore, exempt from being applied to the payment of pecuniary legacies, if there are any such legacies in the will besides its general gift, unless the testator has clearly manifested his intention in the will that there shall be such an exemption.—*Robertson v. Broadbent*, 71.

The exception of something specifically described from a gift (otherwise general) of the personal estate of testator cannot make that gift more specific than it would be if there were no such exception. The excess, over and above what is excepted, is still a general gift, and may be applied to the payment of pecuniary legacies.—*Robertson v. Broadbent*, 71.

A testator by his will, after directing his executors to pay all his just debts and funeral and testamentary expenses, and giving various pecuniary legacies to individuals and to charities, gave all his personal estate and effects of which he should die possessed, and which should not consist of money or securities for money, to R. absolutely. All the rest, residue, and remainder of his estate, both real and personal, he devised to his executors upon certain trusts, and it was provided that the legacies for charitable purposes should be paid exclusively out of such part of his personal estate as might lawfully be appropriated to such purposes, and preferably to any other payment thereout. *Held*, that the legacy to R. was not specific, and was not exempt from the payment of the pecuniary legacies.—*Robertson v. Broadbent*, 71.

Where general legatees are volunteers, taking of the testator's bounty, and there is nothing in the will to indicate that one shall be paid before another, their legacies must abate proportionately, in case of a deficiency of assets; but where a general legacy is sustained by a valuable consideration, such as the relinquishment of a debt or of a claim of dower, and the right to the claim, constituting the consideration, subsists at the testator's death, the legatee is entitled to full payment of his legacy in preference to other general legatees who take merely of the testator's bounty.—*Duncan v. Inhabitants of Township of Franklin*, 74.

ADEMPTION OF LEGACIES.

An ademption of a general legacy results where a parent, or other person standing *in loco parentis*, after having made the bequest, gives a portion to the child to whom the bequest is made, equal to or in excess of the amount bequeathed, the portion given and the legacy being *ejusdem generis*.—*Roquet v. Eldridge*, 67.

Testator devised his homestead farm, constituting nearly the whole of his estate, to two sons jointly. To four other children he gave each the sum of \$500 in cash, which sums were to be taken as in full of their respective interests in the farm. The will recited that the said devises and bequests were to be considered as the disposition of the homestead farm among testator's children, and should not affect any other interest or estate. *Held*, that the legacies were general, rather than specific or demonstrative; and that

they were adeemed by the testator paying, in his life-time, to each of said legatees, the sum of \$500, furnished by the devisees of the farm, and taking a receipt from each legatee showing that the payment was in consideration of the interest of said legatee in the farm under the will.—*Roquet v. Eldridge*, 67.

The fact that one of the legatees was a married woman when she received the money and executed the receipt is immaterial, as the ademption results, by operation of law, from the receipt of the money in testator's life-time from the source contemplated by the will, and not by force of any contract.—*Roquet v. Eldridge*, 67.

In case of a specific devise or bequest, if the very thing devised or bequeathed be transferred to the devisee or legatee in the life-time of the testator, so that nothing is left for the will to operate upon, there is an effectual ademption.—*Roquet v. Eldridge*, 67.

Where the subject of a specific legacy is disposed of after the will is made, so that it does not exist *in specie* at the testator's death, or is so changed that it cannot be called the same thing, the bequest fails, and the legatee is not entitled to money *in lieu* thereof. The motives and intentions of the testator in destroying the subject of the bequest, or changing its form, cannot be considered. Where the legacy is of a debt, payment of the debt to the testator makes an end of the legacy, and the question whether the payment was voluntary or compulsory is immaterial.—*Wyckoff v. Perrine*, 69.

Testator by his will provided as follows: "Whereas, my son-in-law D. borrowed of me the sum of \$2,300, * * * now it is my will, in order to do equal justice to and between my children, that the same shall be considered and taken as so much of the share of his wife, E., of my estate, and I give and bequeath to my said daughter, E., the further sum of \$500, which is to be in full of her share of my estate; and I make no further provisions for the said E. in this my last will." At the time the will was made, D. had, to testator's knowledge, been adjudged a bankrupt, and testator knew also that most of this debt was hopelessly lost. Afterwards testator proved his debt, and received two dividends, amounting to \$508.12. D. received his discharge before testator's death. *Held*, that the testator's intention was to treat the debt of his son-in-law as an advancement to E., and for that purpose he gave her the debt; that this gift of the debt constituted a specific legacy; that it was adeemed; and that E. took under the will only the second legacy given to her, of \$500.—*Wyckoff v. Perrine*, 69.

AGE.

Old age and consequent physical infirmity do not, in themselves, destroy testamentary capacity.—*Waddington v. Buzby*, 1; *Bannister v. Jackson*, 10.

ALTERATION OF INSTRUMENTS.

An alteration of a will, amounting to a different disposition of the estate, cannot be made by inter-

lineation or obliteration, without a re-execution of the will.—*Eschbach v. Collins*, 50.

ATTESTATION.

If the witnesses to a will sign within the hearing, knowledge, and understanding of testator, and so near as not to be substantially away from him, they are considered to be in his presence.—*Cook v. Winchester*, 31.

How. St. Mich. sec. 5789, requiring wills to be attested and subscribed by two or more witnesses "in the presence of the testator," is sufficiently complied with if the witnesses sign the will in a room adjoining that in which testatrix is lying, with the door between standing open, and in a line of vision from the bed of testatrix, though it is physically impossible for her to see the act of signing, she being unable to move herself in the bed so as to get within the line of vision, where the witnesses sign at testatrix's request and with her knowledge, and where, after signing, they return to testatrix's room, and inform her that they have signed, and the will is again read to her, and she is shown the witnesses' signatures, and expresses satisfaction.—*Cook v. Winchester*, 31.

It is not necessary that the testator sign the will in the presence of the attesting witnesses; if the will be so signed as to satisfy the statute, and the testator declared it to be his will before the witnesses, this is equivalent to signing it before them, and is sufficient.—*Adams v. Field*, 34.

The attesting witnesses must see the testator's signature at the time of the attestation, and it is not sufficient that at his request they sign an attestation clause to a will so folded that they cannot see whether it is signed or sealed, although he tells them that it is his will, and that it is ready for their signatures.—*In re Mackay's Will*, 40.

The witnesses should either see the testator subscribe his name, or he should, the signature being visible to him and to them, acknowledge it to be his signature.—*In re Mackay's Will*, 40.

Where the attestation clause in a will recites all the essential facts to constitute a due execution and publication of the instrument as a will, and the surrounding circumstances tend to corroborate the truth of the recitals, the fact that the witnesses, after the lapse of several years, fail to recollect affirmatively the facts recited, will not rebut the presumption of due publication arising from the attestation clause and the other circumstances.—*Brown v. Clark*, 58.

Bequests.

See *Legacies*.

BURDEN OF PROOF.

The burden of proof is on the party offering an instrument for probate to show that it is the will of the alleged testator.—*Rollwagen v. Rollwagen*, 11.

In case of destruction of a will or codicil during the testator's life-time, the burden is on the proponent to show that it was not revoked by the destruction, or by a ratification of the destruction, while the testator lived.—*Rich v. Gilkey*, 43.

The burden of proving that a general legacy is entitled to priority is upon him who asserts it, and the proof must be clear, conclusive, and unequivocal.—*Duncan v. Inhabitants of Township of Franklin*, 75.

CIVIL LAW.

The common-law doctrine in regard to nuncupative wills is derived from the civil law.—*Hubbard v. Hubbard*, 26.

Strict formalities in the execution and construction of nuncupative wills dispensed with by the civil law.—*Hubbard v. Hubbard*, 26.

Rule of revocation of will by subsequent marriage of testator, and birth of issue, adopted from civil law.—*Swan v. Hammond*, 56.

CODICILS.

A will and a codicil are to be construed together as parts of one and the same instrument; so far as their provisions are inconsistent or repugnant, those in the will are revoked by those in the codicil.—*Newcomb v. Webster*, 41.

A codicil, after expressly revoking so much of the will as was inconsistent therewith, made a new and complete disposition of all the testator's property, wholly inconsistent with the disposition made by the will, but did not appoint any executors. *Held*, that the will was entirely revoked, except as to the appointment of executors.—*Newcomb v. Webster*, 41.

In such a case, both instruments should be admitted to probate, as the appointment of executors by the will holds good, although the estate is to be administered according to the provisions of the codicil.—*Newcomb v. Webster*, 41.

It is a general rule of law that a codicil executed with the formalities prescribed by statute for the execution of wills operates as a republication of the will to which it relates, so far as the will is not changed by the codicil, and this rule has not been altered by the New York statutes pertaining to wills.—*Brown v. Clark*, 58.

The will of a *feme sole*, which has been revoked by her marriage, will be revived by the valid execution by her after marriage of a codicil, which clearly refers to and identifies the will; the publication of the codicil is to be deemed a republication of the will, and both together constitute the last will and testament of the testatrix.—*Brown v. Clark*, 58.

CONSTRUCTION.

While the primary rule governing the interpretation and construction of wills admitted to probate recognizes and endeavors to carry out the intention of the testator as expressed in the will, yet, in the construction of the statute regulating their execution, the court considers the intention of the legislature, rather than that of the testator.—*In re O'Neil's Will*, 37.

In construing a will, the court must always have regard to the circumstances, situation, and surroundings of the testator.—*Wyckoff v. Perrine*, 69.

CONTRACTS.

Whether any given writing is a will or a contract must be determined by the character of its contents, rather than from its title, or any formal words with which it may begin or conclude.—*In re Cawley's Estate*, 19.

Although a contract and a will are essentially unlike, they may be combined so as to give a testamentary character to what purports to be a contract, or to convert a will into an irrevocable agreement.—*In re Cawley's Estate*, 19.

Whether a written instrument is a contract or a will is to be determined by the dispositions

which it makes, rather than by designations contained therein referring to it as a "matrimonial and testamentary agreement" or as a "contract."—*In re Diez's Will*, 61.

An instrument in writing signed by a man and his wife, and executed with the formalities of a will, provided as follows: "Inasmuch as we have by joint exertions acquired the property now in our possession, and inasmuch as our only child has already departed this life in the tenderest age, we hereby determine that, upon the decease of one or the other of us, the surviving husband or wife shall receive the entire property of the one having died first,—that is to say, the existing jointly acquired property,"—to him or her unconditionally. *Held*, that the instrument was the will of the one who should first die, and not a contract, notwithstanding the reasons given for the dispositions.—*In re Diez's Will*, 61.

A contract, founded on a sufficient consideration, to make a certain provision by will for a particular person, is valid and enforceable against the estate of the promisor.—*Wellington v. Apthorp*, 65.

A valid oral contract may be made to leave a certain sum of money by will to a particular person, in consideration of services thereafter to be rendered by the promisee to the promisor, provided such services are in fact thereafter rendered and accepted in pursuance of such contract, although the promisee did not bind himself in advance to render them. The performance of the consideration renders the contract binding, and gives a right of action upon it.—*Wellington v. Apthorp*, 64.

A., brother-in-law of B., who was an unmarried woman, had from time to time advised the latter as to her business affairs, and at length, as she found his services valuable, she told him that, if he would continue to act as her agent and adviser respecting her investments, she would make a will leaving to her sister, A.'s wife, \$5,000, or, in the event of his wife's dying before him, she would then, by a new will or codicil, leave him \$5,000. He assented to this, and she made her will accordingly, leaving \$5,000 to A.'s wife. After this time A. took responsible charge of her business matters to a large extent for about 10 years, and negotiated several profitable investments for her upon his own judgment, when a new arrangement was made. A.'s wife fell ill, and, after it had become apparent that this illness would prove fatal, B. told A. that she wished to go to California, and that if he would accompany her there some months later, she would, in consideration of his so accompanying her, and of the services he had rendered and might thereafter render respecting the management of her property, make a will giving him \$5,000, and would pay the expenses of the journey. A. assented, and B. thereupon destroyed the will in favor of A.'s wife, and made a new will giving A. \$5,000. After the death of A.'s wife, A. went with B. to California, being gone several months. Upon his return he married again without B.'s knowledge, and when the latter heard of the marriage she revoked the will which she had made in his favor, (two years and a half having elapsed since this will had been made,) and made another will, giving him nothing. *Held*, in an action against B.'s administrator *cum testamento annexo*, that the facts showed a valid contract on the part of B. to leave A. \$5,000, which was enforceable against the administrator, since A. had completely fulfilled his part of the contract.—*Wellington v. Apthorp*, 64.

See *Deeds*.

DEATH.

Total revocation of a will cannot be implied from the death of a beneficiary.—*Hoitt v. Hoitt*, 53.

WILLS—6

DEBTS.

There may be a specific legacy of a debt which is owing to the testator; as where the identical debt is clearly designated in the will as the exclusive subject intended to be given by the testator.—*Wyckoff v. Perrine*, 69.

Where a debt is the subject of a specific legacy, payment of the debt makes an end of the legacy.—*Wyckoff v. Perrine*, 69.

There is no distinction between the effect of a voluntary payment and a compulsory payment of a debt, the subject of a specific legacy, in adeeming the legacy.—*Wyckoff v. Perrine*, 70.

Declarations of Testator.

See *Evidence*.

DEEDS.

An instrument in writing conveying property, but reserving to the maker "the use, control, and consumption of the same" during the maker's lifetime, may be either a deed or a will, the class to which it belongs being determinable upon all the circumstances surrounding the parties and attending its execution.—*Sharp v. Hall*, 21.

In determining whether an instrument is a deed or a will, the intention of the maker is the controlling inquiry; and that intention is to be gathered primarily from the language of the instrument itself.—*Sharp v. Hall*, 21.

If an instrument cannot have operation as a deed, but may as a will, then, in a doubtful case, it should be pronounced a will.—*Sharp v. Hall*, 23.

An instrument which is to operate in the lifetime of the donor, and to pass an interest in property before his death, even though its absolute enjoyment by the donee is postponed until after the donor's death, or even though it be contingent upon the survivorship of the donee, is a deed or contract, and not a will. But if it is not to have any operation until after the maker's death, then it is a will, notwithstanding it may have been executed in pursuance of a previous promise or obligation appearing upon its face.—*In re Diez's Will*, 61.

Delusions.

See *Insanity*.

Demonstrative Legacies.

See *Specific and Demonstrative Legacies*.

DESTRUCTION OF INSTRUMENTS.

The destruction of a will or codicil by the testator does not operate as a revocation thereof, where, at the time, he did not possess sufficient mental capacity to make a will; the contents of the instrument destroyed may be proved by appropriate evidence, and the will or codicil thus be established.—*Rich v. Gilkey*, 43.

DEVISES.

Obliteration of names of particular devisees not a revocation, but an alteration.—*Eschbach v. Collins*, 48.

Total revocation of a will cannot be implied from the death of a devisee.—*Hoitt v. Hoitt*, 53.

DONATIO CAUSA MORTIS.

Analogy between nuncupative will and *donatio causa mortis*.—Prince v. Hazleton, 30.

Double Wills.

See *Joint Wills: Mutual Wills*.

Errors.

See *Mistake*.

ESTATE OF TESTATOR.

Under a statute declaring that a revocation of a will may be "implied by law from changes in the circumstances of the testator or his family, devisees, legatees, or estate, occurring between the time of making the will and his death," a will is not revoked by the death of testator's wife and son, named in it as legatees, his subsequent remarriage without birth of issue therefrom, the alienation of the larger portion of his estate which had been specifically disposed of by the will, and the acquisition of property much greater in value than he possessed at the time of making the will; nor can a revocation be proved by such changes as circumstantial evidence showing testator's intention.—Hoitt v. Hoitt, 52.

Increase of a testator's estate, after the execution of his will, has no weight upon a question of implied revocation.—Hoitt v. Hoitt, 54; Baldwin v. Spriggs, 57.

Estates.

See *Life-Estates*.

EVIDENCE.

Opinions of witnesses as to mental capacity of a testator are of no weight unless sustained by facts on which such opinions are founded.—Waddington v. Buzby, 1.

The declarations of a testator are competent to show the condition of his mind, but not to prove undue influence.—Middleditch v. Williams, 3.

Undue influence may be shown by all the facts and circumstances surrounding testator, the nature of the will, his family relations, the condition of his health and mind, his dependency upon and subjection to the control of the person supposed to have wielded the influence, the opportunity and disposition to wield it, and the acts and declarations of such person.—Rollwagen v. Rollwagen, 11.

Where the attestation clause in a will recites all the essential facts to constitute a due execution and publication of the instrument as a will, and the surrounding circumstances tend to corroborate the truth of the recitals, the fact that the witnesses, after the lapse of several years, fail to recollect affirmatively the facts recited, will not rebut the presumption of due publication arising from the attestation clause and the other circumstances.—Brown v. Clark, 58.

On a question of the testamentary character of an instrument, the intention of the maker cannot be proved by a witness speaking directly thereto.—Sharp v. Hall, 22.

But this rule does not, in cases of inapt phraseology, preclude proof of instructions given to the draughtsman, in reference to the nature of the paper he was expected to prepare.—Sharp v. Hall, 22.

To render parol evidence with regard to an unexecuted testamentary document, referred to

in the will, admissible for the purpose of incorporating it in the probate, the passage in the will by which reference is made to it must describe it as a written document then existing.—In re Kehoe, 23.

In case of destruction of a will or codicil during the testator's life-time, the presumption is that it was destroyed *animo revocandi*, and the burden is on the proponent to show that it was not revoked by the destruction, or by a ratification of the destruction, while the testator lived.—Rich v. Gilkey, 43.

That a will is found, after testator's decease, in a bundle of papers of no pecuniary value, including drafts or memoranda of wills never executed, some of them apparently made since the date of the will, does not show a revocation of the will, in the absence of any act of revocation within the requirements of the statute.—Hoitt v. Hoitt, 52.

Oral declarations of a testator that he understood his will was revoked, not accompanying any act of revocation, are not competent evidence to prove a revocation; nor are such declarations competent upon the testator's intention not to pass by his will after-acquired real estate.—Hoitt v. Hoitt, 52.

The burden of proving that a general legacy is entitled to priority in payment is upon him who asserts it. The mere production of the will, by which a legacy was given in the following words, "I give and bequeath to Henry Benson Duncan, for his services, (in assisting me at different times,) the sum of two thousand dollars," and which was executed more than six years before the testatrix's death, does not, without other proof, sustain this burden.—Duncan v. Inhabitants of Township of Franklin, 74.

Execution.

See *Attestation; Republication and Revival; Seal; Signature*.

EXECUTORS.

That the will is drawn by the executor does not invalidate it.—Waddington v. Buzby, 1.

Not essential to nuncupative will that an executor be named.—Hubbard v. Hubbard, 26.

Although a codicil, making a new and complete disposition of all the testator's property, wholly inconsistent with the disposition made by the will, operates as a revocation of the will to that extent, if such codicil does not appoint executors, the appointment by the will holds good.—Newcomb v. Webster, 41.

FRAUD.

To invalidate a will for fraud it must appear that the fraud had some effect upon the testator in producing the very act of making his will.—Monroe v. Barclay, 13.

Circumstances raising a strong suspicion, but not producing conviction, that testator was duped in his belief as to spiritual manifestations from his deceased wife, which led him to bestow his bounty upon his mother-in-law and brother-in-law in disregard of a natural affection for his daughter, an only child, will not justify the court in denying probate of the will.—Middleditch v. Williams, 3.

FRAUDS, STATUTE OF.

A contract to leave a certain amount of money by will to a particular person, though oral, is

not open to objection under the statute of frauds.—*Wellington v. Apthorpe*, 64.

General Legacies.

See *Legacies*.

HEIRS AT LAW.

That a will was made by the testator under a mistake in supposing an only son to be dead cannot be shown *dehors* the will as a ground for refusing probate; the mistake must appear on the face of the will, and it must also appear what would have been the will but for the mistake.—*Gifford v. Dyer*, 19.

IMMORAL CONSIDERATIONS.

Immoral considerations influencing a testator in making his will do not constitute such undue influence as will invalidate it, if it is the result of his wish and will at the time.—*Wingrove v. Wingrove*, 17. And see *Monroe v. Barclay*, 16.

Incorporation of Documents.

See *Testamentary Instruments*.

INSANITY.

If a testator possesses sufficient mental power to take into account all the considerations necessary to the making of a proper will, though he is subject to an insane delusion, yet if it appears that such delusion neither influenced him, nor was calculated to influence him, in making his will, the will must be upheld.—*Middleditch v. Williams*, 3.

An insane delusion is a belief in the existence of something which no rational person would, in the absence of evidence, believe to exist, and which springs up spontaneously in the mind, and is not the result of extrinsic evidence of any kind.—*Middleditch v. Williams*, 3.

Where a testator is induced by evidence of some kind, though it may be false, weak, or insufficient, to believe in the existence of something which in reality has no existence, his belief may show want of discernment, that he is overcredulous and easily duped, or that he lacks power to weigh evidence, or to discriminate between what is true and what is false, but it does not show that his mind is unsound.—*Middleditch v. Williams*, 3.

A belief in spiritualism, being a conviction founded upon extrinsic evidence, is not an insane delusion.—*Middleditch v. Williams*, 3.

A will made by an insane person during a lucid interval may be valid, but the facts establishing intelligent action must be shown.—*In re MacPherson's Will*, 7.

Before executing her will, testatrix showed symptoms of insanity, which were displayed especially by causeless outbursts of passion, but these occasions were alternated by continued periods of sanity. Her oral and subsequent written directions for the drafting of the will were rationally given, and the will was reasonable, and accorded with her previously expressed intentions. The subscribing witnesses, one of them a law clerk, testified to her mental capacity when the will was executed. *Held*, that the will should be admitted to probate, the sanity of testatrix at its execution being sufficiently established.—*In re MacPherson's Will*, 7.

See *Testamentary Capacity*.

INTENTION OF TESTATOR.

The intention of the maker of an instrument, gathered primarily from the language of the instrument itself, is controlling on the question of its testamentary character.—*Sharp v. Hall*, 21.

On a question of the testamentary character of an instrument, the intention of the maker cannot be proved by a witness speaking directly thereto.—*Sharp v. Hall*, 22.

But this rule does not, in cases of inapt phraseology, preclude proof of instructions given to the draughtsman, in reference to the nature of the paper he was expected to prepare.—*Sharp v. Hall*, 22.

While the primary rules governing the interpretation and construction of wills admitted to probate recognizes and endeavors to carry out the intention of the testator as expressed in the will, yet, in the construction of the statute regulating their execution, the court considers the intention of the legislature, rather than that of the testator.—*In re O'Neil's Will*, 37.

The intention of a testator is only to be regarded when the law sanctions the means he has adopted to carry it into effect. If what he has done is invalid, the intent cannot be respected.—*Eschbach v. Collins*, 51.

Where the legislature has prescribed certain modes by which a will may be revoked, the courts have no power to dispense with such requirements, and accept even a definite intention to perform the prescribed act for the act itself.—*Hoitt v. Hoitt*, 52.

INTERLINEATION.

A will was drawn upon a printed blank consisting of four pages, the formal commencement being printed upon the first page, and the formal termination printed at the end of the third page. The intervening blank space was filled in in writing, and, as it did not afford sufficient room, a part of one of the material provisions was carried over to the top of the fourth page, and occupied one-third thereof, at the top, the page being left blank below it. The names of the testator and of the subscribing witnesses were written at the bottom of the third page, below the formal termination of the will; but the matter written on the fourth page was not authenticated in any way, nor connected with the unfinished article on the third page by any word or symbol. *Held*, that there was no valid will, as there was not a subscription at the "end of the will," required by 2 Rev. St. N. Y. p. 63, § 40; and that the portion following the signatures could not be regarded as an interlineation, and thus held to be constructively a part of the body of the will.—*In re O'Neil's Will*, 37.

INTOXICATION.

The ordinary test of testamentary capacity is applicable in measuring the extent of impairment of the mental faculties by habitual excessive use of intoxicating liquors, or by the immediate influence of intoxication; either of which may exist without destroying testamentary capacity.—*Bannister v. Jackson*, 8.

Invalid Bequests.

See *Lapse of Legacies*.

JOINT WILLS.

Two or more persons owning property in common may join in a testamentary disposition of

it, and such a will is properly called a joint will.—*In re Cawley's Estate*, 20.

Two sisters, each of whom owned personal property in severalty, and who were also seized of real estate as tenants in common, executed one and the same instrument, which, after providing for the payment of their debts, continued: "Second, that all of our property, both real and personal, go to James Betts and John Drue Betts and their heirs forever;" and it then appointed an executor, and revoked "all former wills by us made," and ratified "this and no other to be our last will and testament." This instrument was presented for probate after the death of both sisters. *Held*, that it should be admitted to probate as the will of both; that it was, in effect, the separate will of each testatrix, and might have been revoked by either, in so far as it was her will; and that upon the death of either it might have been probated, as her separate will.—*Betts v. Harper*, 63.

See *Mutual Wills*.

LAPSE OF LEGACIES.

The residuary legatee in a will is entitled as well to a residue caused by a lapsed legacy, or by an invalid or illegal bequest, as to what remains after payment of debts and legacies. This only exception is that, where the words used show an intention on the part of the testator to exclude from the operation of the residuary clause certain portions of the estate, such intention must prevail. The use of words in a will giving the residue which remains, "after payment of debts and legacies," does not bring a case within the exception, but the general rule still applies, and, if a legacy lapses, it passes to the residuary legatee.—*Tindall v. Tindall*, 75.

LEGACIES.

The fact that a will was drawn by a favored legatee, while it calls for suspicious scrutiny of the circumstances, does not, of itself, invalidate the will.—*Waddington v. Buzby*, 2.

The fact that the influences producing a will sprang from an unlawful marital relation between testatrix and a legatee will not render the will void, unless such influences were exerted in restraint of the free exercise of her will by the testatrix.—*Monroe v. Barclay*, 13.

Pecuniary legacies, in the absence of any sufficient indication of a contrary intention, are payable out of the personal estate not specifically bequeathed, the presumption being that the testator intends them to be so paid, and that he intends specific legacies to pass unconditionally and *in specie* to the persons to whom they are given. Pecuniary legacies are, moreover, not payable out of the real estate, unless charged upon it by the will.—*Robertson v. Broadbent*, 71.

Where general legatees are volunteers, taking of the testator's bounty, and there is nothing in the will to indicate that one shall be paid before another, their legacies must abate proportionately, in case of a deficiency of assets; but where a general legacy is sustained by a valuable consideration, such as the relinquishment of a debt or of a claim of dower, and the right to the claim, constituting the consideration, subsists at the testator's death, the legatee is entitled to full payment of his legacy in preference to other general legatees who take merely of the testator's bounty.—*Duncan v. Inhabitants of Township of Franklin*, 74.

The burden of proving that a general legacy is entitled to priority is upon him who asserts it, and the proof must be clear, conclusive, and unequivocal.—*Duncan v. Inhabitants of Township of Franklin*, 75.

That a legacy was given because of a sense of moral obligation, or as compensation for services, or other favors rendered as a mere voluntary courtesy, will not, if no legal obligation to pay exist at the death of the testator, constitute such a valuable consideration as to entitle the legacy to priority in payment.—*Duncan v. Inhabitants of Township of Franklin*, 74.

The residuary legatee in a will is entitled as well to a residue caused by a lapsed legacy, or by an invalid or illegal bequest, as to what remains after payment of debts and legacies. The only exception is that, where the words used show an intention on the part of the testator to exclude from the operation of the residuary clause certain portions of the estate, such intention must prevail. The use of words in a will giving the residue which remains, "after payment of debts and legacies," does not bring a case within the exception, but the general rule still applies, and, if a legacy lapses, it passes to the residuary legatee.—*Tindall v. Tindall*, 75.

See *Abatement of Legacies; Ademption of Legacies; Debts; Specific and Demonstrative Legacies*.

LIFE-ESTATES.

Not enlarged to a fee by obliteration of part of the clause creating it.—*Eschbach v. Collins*, 48.

LUCID INTERVALS.

A will made by an insane person during a lucid interval may be valid, but the facts establishing intelligent action must be shown.—*In re MacPherson's Will*, 7.

See *Testamentary Capacity*.

MARRIAGE.

Revocation of the will of a man is not implied, at common law, from his subsequent marriage, without birth of issue thereof.—*Hoitt v. Hoitt*, 53.

The rule of implied revocation of a will by subsequent marriage of the testator and birth of issue is inoperative where, by statute, the widow and children of a testator, if not provided for in the will, are entitled to the same share of the estate as if he had died intestate.—*Hoitt v. Hoitt*, 53.

The rule that a man's will is impliedly revoked by his subsequent marriage and the birth of a child is subject to an exception, and is therefore not applied, in cases where the testator has made provision for his children born after the execution of the will.—*Baldwin v. Spriggs*, 56.

Testator, married and having children, made a will which disposed of all the property owned by him at that time. Subsequently his wife died, and he married again, and had children by his second wife. He lived 20 years after the date of the will, and during that time acquired other real estate. *Held*, that this after-acquired property would not be considered as a provision for the children of the second marriage, so as to bring the case within the exception, but that the will was revoked.—*Baldwin v. Spriggs*, 56.

At common law, marriage of a *feme sole* revokes her will previously made.—*Swan v. Hammond*, 56; *Brown v. Clark*, 58.

The rule of the common law that the will of a *feme sole* is revoked by her marriage, while the will of a man is revoked, not by his marriage alone, but by marriage and the birth of a child, is recognized and made binding on the courts by Pub. St. Mass. c. 127, § 8, which, after declaring that no will shall be revoked unless by bur-

ing, tearing, etc., or some other writing executed in the manner required in the case of a will, provides: "But nothing contained in this section shall prevent the revocation implied by law from subsequent changes in the condition or circumstances of the testator;" and the courts are not at liberty to change the rule as to the will of a *jeme sole*, even if the reason of the rule is destroyed by the statutes giving married women testamentary capacity.—*Swan v. Hammond*, 55.

The rule that the will of a *jeme sole* is revoked by her marriage is not affected by the statutes conferring testamentary capacity upon married women, unless the statutes expressly change such rule.—*Swan v. Hammond*, 55; *Brown v. Clark*, 58.

The New York statute, (2 Rev. St. N. Y. p. 64, § 44,) which provides that the will of an unmarried woman shall be deemed revoked by her subsequent marriage, declares an absolute rule. It does not make the marriage merely a presumptive revocation, which may be rebutted by proof of a contrary intention, but causes it to operate *eo instanti* as a revocation.—*Brown v. Clark*, 58.

Statutes of many states provide that wills of both men and women shall be revoked by marriage.—*Swan v. Hammond*, 56.

The will of a *jeme sole*, which has been revoked by her marriage, will be revived by the valid execution by her after marriage of a codicil, which clearly refers to and identifies the will; the publication of the codicil is to be deemed a republication of the will, and both together constitute the last will and testament of the testatrix.—*Brown v. Clark*, 58.

The ademption of a general legacy by the payment by the testator, during his life-time, to the legatee, of the amount of the legacy, from the source contemplated by the will, is not affected by the fact that the legatee is a married woman, as the ademption results, under such circumstances, by operation of law, and not by force of any contract.—*Roquet v. Eldridge*, 67.

MAXIMS.

"*Cessante ratione legis, cessat lex ipse.*"—*Brown v. Clark*, 59.

"*Stare decisis.*"—*Adams v. Field*, 36.

"*Ut res magis valeat.*"—*Sharp v. Hall*, 23.

MISTAKE.

Two sisters agreed to make their respective wills so that, upon the death of either, the other should have the joint property for life. One of them prepared both wills in her own handwriting, but upon her death it was found that each sister had executed the will prepared for the other. The will executed by the deceased would, if carried into effect, accomplish her wishes in most respects, but not as to one legacy. *Held* that, as deceased did not know and approve of the contents of the document she executed, probate should be refused.—*In re Goods of Hunt*, 18.

Mistake of a testator in supposing an only son to be dead cannot be shown by evidence *dehors* the will as a ground for refusing probate; the mistake must appear on the face of the will, and it must also appear what would have been the will but for the mistake.—*Gifford v. Dyer*, 19.

MUTUAL WILLS.

Wills by which two or more persons make reciprocal testamentary provisions in favor of each other, whether they unite in one will, or each executes a separate one, are mutual or reciprocal wills.—*In re Cawley's Estate*, 19.

A brother and sister, owning separate properties, made a will together, which read as follows: "I, Benjamin Cawley, should I be the first to die, give, devise, and bequeath, and I, Mary Cawley, should I be the first to die, give, devise, and bequeath and to the survivor of us all the rest and residue of the decedent's estate, both real and personal, to have and hold and enjoy the same during the life of the survivor," etc.; and directed that, at the expiration of the life-estate, the residue should be divided into nine parts, "three of which parts I give and bequeath," etc., the singular number being used through the whole instrument. *Held*, that the instrument was the separate will of each, and the survivor, as to her property, had a right to make a new will containing a different disposition thereof.—*In re Cawley's Estate*, 19.

Reciprocal testamentary dispositions by two persons may be combined in one instrument.—*In re Diez's Will*, 61; *Betts v. Harper*, 63.

Such instrument operates, on the death of either of the persons making it, as the separate will of that person.—*In re Diez's Will*, 61; *Betts v. Harper*, 63.

Where by mistake in the execution of mutual wills each party executes the instrument prepared for the other, effect cannot be given to a will so executed by treating the bequest therein to the person signing it as a misdescription of the other party, even though to do so would, to a great extent, carry out the wishes of the testator.—*In re Goods of Hunt*, 18.

See *Joint Wills*.

Next of Kin.

See *Heirs at Law*.

NUNCUPATIVE WILLS.

Under 2 Rev. St. N. Y. p. 60, § 22, providing that no nuncupative or unwritten will, bequeathing personal estate, shall be valid, unless made by a soldier while in actual service, or by a mariner while at sea, the wills of soldiers in actual service and of mariners at sea are governed by the principles of the common law.—*Hubbard v. Hubbard*, 25.

A nuncupative or oral will may be made by the master and owner of a coasting vessel while she is on a voyage, and lying at anchor in an arm of the sea, where the tide ebbs and flows.—*Hubbard v. Hubbard*, 25.

It is sufficient that testator, in prospect of death, in answer to what disposition he wishes to make of his property states his wishes. No particular form of bequest is necessary, nor is it necessary for him to request any persons present to witness that it is his will.—*Hubbard v. Hubbard*, 25.

Testamentary capacity of deceased and *animus testandi* at the time of the alleged nuncupation should be clearly and satisfactorily proved.—*Hubbard v. Hubbard*, 26.

It is not essential to a nuncupative will that an executor be named.—*Hubbard v. Hubbard*, 26.

At common law, and under a statute (Laws N. Y. Sess. 36, c. 23, § 14) declaring that a nuncupative will shall not be valid unless "made in the time of the last sickness of the deceased," a nuncupative will is not good unless it be made when testator is *in extremis*, or overtaken by sudden and violent sickness, and has not time to make a written will.—*Prince v. Hazleton*, 27. See *Hubbard v. Hubbard*, 25.

An alleged nuncupative will offered for probate had all the legal requisites and formalities. The evidence to support it showed that it was

made six days before testator's death, while he was declining from a disease of the liver, but under no immediate apprehension of death. Testator was of middle age, had a fair education and habits of business, and had accumulated a fortune, and at the time of his death was boarding in New York city. He had been sick about five weeks, and was attended by a physician and a hired nurse. Another woman, living apart from her husband in such boarding-house, also acted as his nurse. No acquaintance with this woman prior to his sickness was shown, but to her he left his entire property. *Held*, that the alleged will was not made under such circumstances as to entitle it to probate as a nuncupative will.—*Prince v. Hazleton*, 27.

Obliteration.

See *Revocation*.

OPINION.

Opinions of witnesses as to mental capacity of a testator, of no weight unless sustained by facts on which such opinions are founded.—*Waddington v. Buzby*, 1.

Oral Wills.

See *Nuncupative Wills*.

PARENT AND CHILD.

Mistake of a testator in supposing an only son to be dead cannot be shown by evidence *dehors* the will as a ground for refusing probate; the mistake must appear on the face of the will, and it must also appear what would have been the will but for the mistake.—*Gifford v. Dyer*, 19.

An ademption of a general legacy results where a parent, or other person standing *in loco parentis*, after having made the bequest, gives a portion to the child to whom the bequest is made, equal to or in excess of the amount bequeathed, the portion given and the legacy being *ejusdem generis*.—*Roquet v. Eldridge*, 67.

Parol Evidence.

See *Evidence*.

PAYMENT OF LEGACIES.

Pecuniary legacies, in the absence of any sufficient indication of a contrary intention, are payable out of the personal estate not specifically bequeathed, the presumption being that the testator intends them to be so paid, and that he intends specific legacies to pass unconditionally and *in specie* to the persons to whom they are given. Pecuniary legacies are, moreover, not payable out of the real estate, unless charged upon it by the will.—*Robertson v. Broadbent*, 71.

Where a general legacy is sustained by a valuable consideration, such as the relinquishment of a debt or of a claim of dower, and the right to the claim, constituting the consideration, subsists at the testator's death, the legatee is entitled to full payment of his legacy in preference to other general legatees who take merely of the testator's bounty.—*Duncan v. Inhabitants of Township of Franklin*, 74.

The burden of proving that a general legacy is entitled to priority in payment is upon him who asserts it.—*Duncan v. Inhabitants of Township of Franklin*, 74.

That a legacy was given because of a sense of moral obligation, or as compensation for services, or other favors rendered as a mere voluntary courtesy, will not, if no legal obligation to pay exist at the death of the testator, constitute such a valuable consideration as to entitle the legacy to priority in payment.—*Duncan v. Inhabitants of Township of Franklin*, 74.

See *Abatement of Legacies; Ademption of Legacies; Debts*.

PRESUMPTIONS.

Undue influence, in a case where no relation of trust exists, cannot be presumed.—*Middleditch v. Williams*, 7.

Where the attestation clause in a will recites all the essential facts to constitute a due execution and publication of the instrument as a will, and the surrounding circumstances tend to corroborate the truth of the recitals, the fact that the witnesses, after the lapse of several years, fail to recollect affirmatively the facts recited, will not rebut the presumption of due publication arising from the attestation clause and the other circumstances.—*Brown v. Clark*, 58.

The presumption in case a will or codicil is destroyed during the testator's life-time is that it was destroyed *animo revocandi*, and the burden is on the proponent to show that it was not revoked by the destruction, or by a ratification of the destruction, while the testator lived.—*Rich v. Gilkey*, 43.

Under the New York statute, (2 Rev. St. N. Y. p. 64, § 44,) which provides that the will of an unmarried woman shall be deemed revoked by her subsequent marriage, the marriage is not merely a presumptive revocation, which may be rebutted by proof of a contrary intention, but operates *eo instanti* as a revocation.—*Brown v. Clark*, 58.

PROBATE.

Party offering instrument for probate as a will must show satisfactorily that it is the will of the alleged testator, and upon this question he has the burden of proof.—*Rollwagen v. Rollwagen*, 11.

Where a testator was deaf and dumb, or unable to read or write and speak, there must not only be proof of the *factum* of the will, but also that the mind of the testator accompanied the act, and that the instrument speaks his language and really expresses his will.—*Rollwagen v. Rollwagen*, 12.

Where a will is wholly revoked by a codicil, except as to the appointment of executors, none being appointed by the codicil, both instruments should be admitted to probate.—*Newcomb v. Webster*, 41.

Publication.

See *Attestation; Republication and Revival*.

REPUBLICATION AND REVIVAL.

It is a general rule of law that a codicil executed with the formalities prescribed by statute for the execution of wills operates as a republication of the will to which it relates, so far as the will is not changed by the codicil, and this rule has not been altered by the New York statutes pertaining to wills.—*Brown v. Clark*, 58.

The will of a *feme sole*, which has been revoked by her marriage, will be revived by the valid execution by her after marriage of a codi-

cl, which clearly refers to and identifies the will; the publication of the codicil is to be deemed a republication of the will, and both together constitute the last will and testament of the testatrix.—*Brown v. Clark*, 58.

RESIDUARY LEGACIES.

The residuary legatee in a will is entitled as well to a residue caused by a lapsed legacy, or by an invalid or illegal bequest, as to what remains after payment of debts and legacies. The only exception is that, where the words used show an intention on the part of the testator to exclude from the operation of the residuary clause certain portions of the estate, such intention must prevail. The use of words in a will giving the residue which remains, "after payment of debts and legacies," does not bring a case within the exception, but the general rule still applies, and, if a legacy lapses, it passes to the residuary legatee.—*Tindall v. Tindall*, 75.

REVOCATION.

Although a contract and a will are essentially unlike, they may be combined so as to give a testamentary character to what purports to be a contract, or to convert a will into an irrevocable agreement.—*In re Cawley's Estate*, 19.

A will and a codicil are to be construed together as parts of one and the same instrument; so far as their provisions are inconsistent or repugnant, those in the will are revoked by those in the codicil.—*Newcomb v. Webster*, 41.

A codicil, after expressly revoking so much of the will as was inconsistent therewith, made a new and complete disposition of all the testator's property, wholly inconsistent with the disposition made by the will, but did not appoint any executors. *Held*, that the will was entirely revoked, except as to the appointment of executors.—*Newcomb v. Webster*, 41.

In such a case, both instruments should be admitted to probate, as the appointment of executors by the will holds good, although the estate is to be administered according to the provisions of the codicil.—*Newcomb v. Webster*, 41.

The destruction of a will or codicil by the testator does not operate as a revocation thereof, where, at the time, he did not possess sufficient mental capacity to make a will; the contents of the instrument destroyed may be proved by appropriate evidence, and the will or codicil thus be established.—*Rich v. Gilkey*, 43.

But the presumption, in case a will or codicil is destroyed during the testator's life-time, is that it was destroyed *animo revocandi*, and the burden is on the proponent to show that it was not revoked by the destruction, or by a ratification of the destruction, while the testator lived.—*Rich v. Gilkey*, 43.

Where the act of destruction by the testator is produced by undue influence, the effect is the same as where a testator, not having testamentary capacity, destroys his will or codicil; the instrument destroyed stands unrevoked.—*Rich v. Gilkey*, 43.

The provision of the Maine statute of wills, (Rev. St. Me. c. 74, § 3,) that a will executed according to its requirements "is valid until destroyed, altered, or revoked by being intentionally burnt, canceled, torn, or obliterated by the maker, or by some person by his direction and in his presence, or by a subsequent will, codicil, or writing, executed as a will is required to be, etc., is not changed by a subsequent statute, (Rev. St. Me. c. 64, § 7,) providing that where a will "is lost, destroyed, suppressed," etc., "and upon proof of the continued existence of such

will, up to the time of the decease of said testator, unrevoked, letters testamentary shall be granted as on the last will of the deceased, the same as if the original will had been produced and proved;" such latter statute is declarative and cumulative only, and does not abrogate, or undertake to abrogate, the former act.—*Rich v. Gilkey*, 43.

By a codicil to his will, testator gave to his niece the income of certain property during her life; but about a year afterwards, and about a month before his death, he destroyed the codicil, and made another, disposing in a different way of the property given by the former in trust for her. In proceedings for probate of the destroyed codicil, it appeared that testator had had the warmest affection for his niece against all family opposition; that he had educated and supported her, and seemed desirous to make her dependent upon him for all her wants, and held out to her promises against want in the future; that he made the provision in her favor when he was in full health and strength, unasked by her, apparently uninfluenced by any one, with much deliberation, against family wishes; that he adhered to this codicil until his last sickness; and that he destroyed it only after he had lain a month on his death-bed, a very aged man, weakened by disease, surrounded by persons naturally disturbed by the existence of the codicil, and with no notice of its destruction to the beneficiary, or subsequent mention of it to her, although the affection between them continued unchanged. *Held*, upon a reference of the cause at the trial to the judge to "decide all questions upon the merits as affected by considerations of expediency and compromise," that the inference was irresistible that the act of destruction was caused by another or others, whether the influence exerted was undue influence or not; and that it was expedient to uphold the first codicil, allowing as concessions to the opponents that the latter codicil should also be probated, there being no contradiction between the two, except a recital in the latter which ignored the former; and that the costs and counsel fees of the beneficiary should not be paid out of the estate.—*Rich v. Gilkey*, 43.

The will of a testator, who had seven sons and three daughters, gave the residue of his estate to them in equal shares, "the share of my sons L. and J. to be held by each of them who may survive me, absolutely," and "the shares of my other children to be held for their respective lives." *Held*, that an obliteration of the names of L. and J. by the testator did not operate to enlarge the life-estate given to the other sons into a fee, and make the word "children" applicable only to the daughters, thus making a different disposition of the estate without the formalities required by statute; nor could the supposed intention of the testator, to diminish the fee simple estates of L. and J. to life-estates, be regarded, since he had not adopted the means sanctioned by the law to carry it into effect; and the will must be read as it was originally written.—*Eschbach v. Collins*, 48.

Such obliteration of the names of particular devisees does not make a case of revocation, within the provision of Code Md. art. 93, § 302, that "no devise in writing, * * * or any clause thereof, shall be revocable," except in the manner prescribed; the mere names do not constitute a clause, and their obliteration, by which a different meaning is imparted, is an alteration, not a revocation.—*Eschbach v. Collins*, 48.

Where the legislature has prescribed certain modes by which a will may be revoked, the courts have no power to dispense with such requirements, and accept even a definite intention to perform the prescribed act for the act itself.—*Hoitt v. Hoitt*, 52.

That a will is found, after testator's decease, in a bundle of papers of no pecuniary value, in-

cluding drafts or memoranda of wills never executed, some of them apparently made since the date of the will, does not show a revocation of the will, in the absence of any act of revocation within the requirements of the statute.—Hoitt v. Hoitt, 52.

Although such statute declares that a revocation may be "implied by law from changes in the circumstances of the testator or his family, devisees, legatees, or estate, occurring between the time of making the will and his death," a will is not revoked by the death of testator's wife and son, named in it as legatees, his subsequent remarriage without birth of issue therefrom, the alienation of the larger portion of his estate which had been specifically disposed of by the will, and the acquisition of property much greater in value than he possessed at the time of making the will; nor can a revocation be proved by such changes, as circumstantial evidence showing testator's intention.—Hoitt v. Hoitt, 52.

Oral declarations of a testator that he understood his will was revoked, not accompanying any act of revocation, are not competent evidence to prove a revocation; nor are such declarations competent upon the testator's intention not to pass by his will after-acquired real estate.—Hoitt v. Hoitt, 52.

Increase of a testator's estate, after the execution of his will, has no weight upon a question of implied revocation.—Hoitt v. Hoitt, 54; Baldwin v. Spriggs, 57.

The rule that a man's will is impliedly revoked by his subsequent marriage and the birth of a child is subject to an exception, and is therefore not applied, in cases where the testator has made provision for his children born after the execution of the will.—Baldwin v. Spriggs, 56.

Testator, married and having children, made a will which disposed of all the property owned by him at that time. Subsequently his wife died, and he married again, and had children by his second wife. He lived 20 years after the date of the will, and during that time acquired other real estate. *Held*, that this after-acquired property would not be considered as a provision for the children of the second marriage, so as to bring the case within the exception, but that the will was revoked.—Baldwin v. Spriggs, 56.

The doctrine of implied revocation of wills by subsequent marriage of the testator and birth of issue rests, not upon a presumption of changed intention, but upon a tacit condition annexed to the will when made, that it should not take effect if there should be a total change in the situation of the testator's family.—Baldwin v. Spriggs, 57. See Hoitt v. Hoitt, 55.

The rule of the common law that the will of a *feme sole* is revoked by her marriage, while the will of a man is revoked, not by his marriage alone, but by marriage and the birth of a child, is recognized and made binding on the courts by Pub. St. Mass. c. 127, § 8, which, after declaring that no will shall be revoked unless by burning, tearing, etc., or some other writing executed in the manner required in the case of a will, provides: "But nothing contained in this section shall prevent the revocation implied by law from subsequent changes in the condition or circumstances of the testator;" and the courts are not at liberty to change the rule as to the will of a *feme sole*, even if the reason of the rule is destroyed by the statutes giving married women testamentary capacity.—Swan v. Hammond, 55.

The New York statute, (2 Rev. St. N. Y. p. 64, § 44,) which provides that the will of an unmarried woman shall be deemed revoked by her subsequent marriage, declares an absolute rule. It does not make the marriage merely a presumptive revocation, which may be rebutted by proof of a contrary intention, but causes it to operate *eo instanti* as a revocation. The statutes conferring testamentary capacity upon mar-

ried women have not abrogated this rule, that marriage effects a revocation.—Brown v. Clark, 58.

SEAL.

In New York a seal is not required to a will of real or personal estate. (2 Rev. St. N. Y. p. 63, § 40.)—In re Diez's Will, 61.

SIGNATURE.

Where a statute does not require, for the proper execution of a will, that it be "signed at the end" or "subscribed" by the testator, but merely that it be "signed" by him, he may write his signature at the beginning of the will, or in any other part; and if this be done for the purpose of giving finality to the will, and no further signing is contemplated, it is sufficient; and, even if a further signing is contemplated, still the testator may subsequently adopt the signature already written as his final signature, and then no further signing will be necessary.—Adams v. Field, 34.

A will which was wholly in the testator's handwriting, but was written in its different parts at different times, began with the words, "I, Samuel Adams, * * * do hereby make this, my last will and testament." Then followed the clauses disposing of his estate, and at the end was the usual testimonium clause, viz., "In testimony whereof I have hereunto set my hand and seal," etc.; but there was no signature after this clause. It appeared, however, that the testator produced the instrument to three subscribing witnesses, and declared it in their presence to be his will, and requested them to witness it as his will, and that they did attest it in his presence, and in the presence of each other. *Held*, that the testator thereby adopted the signature written by him at the beginning of the will as his final signature, to authenticate and complete the will, and that this was a sufficient signing of the will, under the Vermont statute; the whole subject-matter of the will being at this time in his mind, and the will being completed by one simultaneous act.—Adams v. Field, 34.

It is not necessary that the testator sign the will in the presence of the attesting witnesses; if the will be so signed as to satisfy the statute, and the testator declared it to be his will before the witnesses, this is equivalent to signing it before them and is sufficient.—Adams v. Field, 34.

A will was drawn upon a printed blank consisting of four pages, the formal commencement being printed upon the first page, and the formal termination printed at the end of the third page. The intervening blank space was filled in in writing, and, as it did not afford sufficient room, a part of one of the material provisions was carried over to the top of the fourth page, and occupied one-third thereof, at the top, the page being left blank below it. The names of the testator and of the subscribing witnesses were written at the bottom of the third page, below the formal termination of the will; but the matter written on the fourth page was not authenticated in any way, nor connected with the unfinished article on the third page by any word or symbol. *Held* not a subscription at the "end of the will," as required by 2 Rev. St. N. Y. p. 63, § 40; and that the portion preceding the signatures could not be admitted to probate, but that the will, so far as execution was concerned, must be deemed valid or invalid as a whole.—In re O'Neil's Will, 37.

In New York a seal is not required to a will of real or personal estate; the testator must subscribe his name at the end, but need not attach a seal. (2 Rev. St. N. Y. p. 63, § 40.)—In re Diez's Will, 61.

SPECIFIC AND DEMONSTRATIVE LEGACIES.

A legacy is specific when it can be satisfied only by the transfer or delivery of some particular portion of, or article belonging to, the estate, which the testator intended should be transferred to the legatee *in specie*.—*Roquet v. Eldridge*, 67.

A demonstrative legacy is a bequest of a sum of money payable out of a particular fund or thing. It is a pecuniary legacy, given generally, but with a demonstration of a particular fund as the source of its payment, and is equivalent to a devise or bequest of so much or such a part of the fund or thing specified.—*Roquet v. Eldridge*, 67.

Testator devised his homestead farm, constituting nearly the whole of his estate, to two sons jointly. To four other children he gave each the sum of \$500 in cash, which sums were to be taken as in full of their respective interests in the farm. The will recited that the said devises and bequests were to be considered as the disposition of the homestead farm among testator's children, and should not affect any other interest or estate. *Held*, that the legacies were general, rather than specific or demonstrative.—*Roquet v. Eldridge*, 67.

In order to make a legacy specific, some form of expression must be used in the will which clearly indicates a purpose on the part of the testator to give a specific thing, and nothing else. There may be a specific legacy of a debt which is owing to the testator, as where the identical debt is clearly designated in the will as the exclusive subject intended to be given by the testator.—*Wyckoff v. Perrine*, 69.

In deciding whether a legacy is specific or general, the intention of the testator must control.—*Wyckoff v. Perrine*, 70.

Points of difference between specific and demonstrative legacies are these: A specific legacy is not liable to abatement for the payment of debts, but a demonstrative legacy is liable to abate when it becomes a general legacy by reason of the failure of the fund out of which it is payable. A specific legacy is liable to ademption, but a demonstrative legacy is not. A specific legacy, if of stock, carries with it the dividends which accrue from the death of the testator, while a demonstrative legacy does not carry interest from the testator's death.—*Wyckoff v. Perrine*, 70, note.

Anything which a testator, identifying by a sufficient description, and manifesting an intention that it should be enjoyed or taken in the state and condition indicated by that description, separates in favor of a particular legatee from the general mass of his personal estate, is a specific legacy.—*Robertson v. Broadbent*, 71.

A bequest, in general terms, of the whole personal estate to which a testator may be entitled at the time of his death, is not a specific legacy.—*Robertson v. Broadbent*, 71.

The exception of something specifically described from a gift (otherwise general) of the personal estate of the testator cannot make that gift more specific than it would be if there were no such exception. The excess over and above what is excepted is still a general gift, and may be applied to the payment of pecuniary legacies.—*Robertson v. Broadbent*, 71.

A testator by his will, after directing his executors to pay all his just debts and funeral and testamentary expenses, and giving various pecuniary legacies to individuals and to charities, gave all his personal estate and effects of which he should die possessed, and which should not consist of money or securities for money, to R. absolutely. All the rest, residue, and remainder of his estate, both real and personal, he devised to his executors upon certain trusts, and it

was provided that the legacies for charitable purposes should be paid exclusively out of such part of his personal estate as might lawfully be appropriated to such purposes, and preferably to any other payment thereof. *Held*, that the legacy to R. was not specific, and was not exempt from the payment of the pecuniary legacies.—*Robertson v. Broadbent*, 71.

See *Abatement of Legacies; Ademption of Legacies; Debts*.

SPIRITUALISM.

A belief in spiritualism, being a conviction founded on extrinsic evidence, is not an insane delusion.—*Middleditch v. Williams*, 3.

A belief in spiritualism may justify setting aside a will when it is shown that the testator, through fear, dread, or reverence of the spirit with which he believed himself to be in communication, allowed his will and judgment to be overpowered, and in disposing of his property followed implicitly the directions which he believed the spirit gave him; but in such case the will is set aside, not on the ground of insanity, but of undue influence.—*Middleditch v. Williams*, 3.

Circumstances raising a strong suspicion, but not producing conviction, that testator was duped in his belief as to spiritual manifestations from his deceased wife, which led him to bestow his bounty upon his mother-in-law and brother-in-law in disregard of a natural affection for his daughter, an only child, will not justify the court in denying probate of the will.—*Middleditch v. Williams*, 3.

Subscribing Witnesses.

See *Attestation; Signature*.

TESTAMENTARY CAPACITY.

A person who is aged, infirm, and almost blind may make a valid will, if capable of recollecting the property she is about to dispose of, understanding the manner of distributing it as therein set forth, knowing the objects of her bounty, and the nature of the business in which she is engaged.—*Waddington v. Buzby*, 1; *Bannister v. Jackson*, 10.

Testatrix was 83 years of age, feeble and somewhat blind, forgetful to the extent that such aged persons usually are, but she went about the house, knew the members of the family, talked about her business affairs, remembered the amount of her property and where it was invested, objected to the reduction of the interest on her investments, took part in the routine of the house and the payment of bills, and conversed with visitors whom she knew. *Held*, that she had testamentary capacity.—*Waddington v. Buzby*, 1.

If a testator possesses sufficient mental power to take into account all the considerations necessary to the making of a proper will, though he is subject to an insane delusion, yet if it appears that such delusion neither influenced him, nor was calculated to influence him, in making his will, the will must be upheld.—*Middleditch v. Williams*, 3.

An insane delusion is a belief in the existence of something which no rational person would, in the absence of evidence, believe to exist, and which springs up spontaneously in the mind, and is not the result of extrinsic evidence of any kind.—*Middleditch v. Williams*, 3.

Where a testator is induced by evidence of some kind, though it may be false, weak, or insufficient, to believe in the existence of some-

thing which in reality has no existence, his belief may show want of discernment, that he is overcredulous and easily duped, or that he lacks power to weigh evidence, or to discriminate between what is true and what is false, but it does not show that his mind is unsound.—*Middleitch v. Williams*, 3.

A belief in spiritism, being a conviction founded upon extrinsic evidence, is not an insane delusion.—*Middleitch v. Williams*, 3.

Even if it appears that a testator was subject to an insane delusion when he made his will, but it is also made to appear that his delusion was not of a character likely to influence him, and did not influence him, in the disposition which he made of his property, his will should be declared valid.—*Middleitch v. Williams*, 5.

The test of testamentary capacity is that the testator can comprehend the property that he is about to dispose of, the objects of his bounty, the meaning of the business in which he is engaged, the relation of each of these factors to the others, and the distribution that is made by the will. The effect of present intoxication and mental disease, induced by habitual indulgence in intoxicants, must be measured by such test, for both may exist in some degree without destroying testamentary capacity.—*Bannister v. Jackson*, 8.

Testator bequeathed \$500 to his wife, and the same sum to his daughter, and the balance of the estate, valued at \$15,000, was divided among his brothers. He was addicted to the excessive use of intoxicating liquors, which had impaired, to some extent, both his mental and physical powers. But while at times he seemed to be afflicted with dullness and loss of memory, at other times he exhibited a keen, shrewd capacity for business, and a strong will. About the time of making the will he sold out his business to good advantage, and afterwards was identified with business enterprises, being elected director of a building association. The will provided that the money left to the daughter should be free from the control of her husband, although the latter was dead at the time of making the will; but this was in part explained by his separation from his wife and daughter, and by the fact that the daughter had separated from her husband. When the will was executed the testimony showed that he had been drinking a little, but not to such an extent as to disorder his faculties or pervert his judgment. *Held*, that lack of testamentary capacity was not shown.—*Bannister v. Jackson*, 8.

A will made by an insane person during a lucid interval may be valid, but the facts establishing intelligent action must be shown.—*In re MacPherson's Will*, 7.

Before executing her will, testatrix showed symptoms of insanity, which were displayed especially by causeless outbursts of passion; but these occasions alternated with continued periods of sanity. Her oral and subsequent written directions for the drafting of the will were rationally given, and the will was reasonable, and accorded with her previously expressed intentions. The subscribing witnesses, one of them a law clerk, testified to her mental capacity when the will was executed. *Held*, that the will should be admitted to probate, the sanity of testatrix at its execution being sufficiently established.—*In re MacPherson's Will*, 7.

Opinions of witnesses as to mental capacity of a testator of no weight unless sustained by facts on which such opinions are founded.—*Waddington v. Buzby*, 1.

TESTAMENTARY INSTRUMENTS.

Whether any given writing is a will or a contract must be determined by the character of its

contents, rather than from its title, or any formal words with which it may begin or conclude.—*In re Cawley's Estate*, 19.

Although a contract and a will are essentially unlike, they may be combined so as to give a testamentary character to what purports to be a contract, or to convert a will into an irrevocable agreement.—*In re Cawley's Estate*, 19.

Whether a written instrument is a contract or a will is to be determined by the dispositions which it makes, rather than by designations contained therein referring to it as a "matrimonial and testamentary agreement" or as a "contract."—*In re Diez's Will*, 61.

The distinguishing feature of a will is that it is not to take effect except upon the death of the testator. An instrument which is to operate in the life-time of the donor, and to pass an interest in property before his death, even though its absolute enjoyment by the donee is postponed until after the donor's death, or even though it be contingent upon the survivorship of the donee, is a deed or contract, and not a will. But if it is not to have any operation until after the maker's death, then it is a will, notwithstanding it may have been executed in pursuance of a previous promise or obligation appearing upon its face.—*In re Diez's Will*, 61.

An instrument in writing signed by a man and his wife, and executed with the formalities of a will, provided as follows: "Inasmuch as we have by joint exertions acquired the property now in our possession, and inasmuch as our only child has already departed this life in the tenderest age, we hereby determine that, upon the decease of one or the other of us, the surviving husband or wife shall receive the entire property of the one having died first,—that is to say, the existing jointly acquired property,"—to him or her unconditionally. *Held*, that the instrument was the will of the one who should first die, and not a contract, notwithstanding the reasons given for the dispositions.—*In re Diez's Will*, 61.

An instrument in writing conveying property, but reserving to the maker "the use, control, and consumption of the same" during the maker's life-time, may be either a deed or a will, the class to which it belongs being determinable upon all the circumstances surrounding the parties and attending its execution. But the intention of the maker is the controlling inquiry; and that intention is to be gathered primarily from the language of the instrument itself.—*Sharp v. Hall*, 21.

Upon that question it is proper to consider the facts that the maker of the instrument was without near relatives; that she was attached to the donee, who was a member of her household; that she employed the scrivener to write a will, and executed the instrument drawn by him, knowing its contents, and had it attested; that she did not deliver it, but had it placed in an envelope with an indorsement that it was not to be opened until her death; that she carefully preserved it until she died; that the maker did not dispose of all her property; and that a clause in such instrument stated that it was intended in part to dispense with the necessity of taking out letters of administration on the maker's estate after her death.—*Sharp v. Hall*, 21.

If a paper cannot have operation as a deed, but may as a will, then, in a doubtful case, it should be pronounced a will, *ut res magis valeat*.—*Sharp v. Hall*, 23.

To incorporate a document in the probate of a will, three things are necessary: (1) That the will should refer to the document as then in existence; (2) proof that the document propounded was in fact written before the will was made; and (3) proof of the identity of such document with that referred to in the will.—*In re Kehoe*, 23.

Testator bequeathed all property he died possessed of to his executors, to be disposed of in charity in such manner as "I may direct them; and, in case I may not leave directions or instructions, then they may dispose of it in such manner as they think fit." He signed a paper bearing the same date as the will, and in his own handwriting, containing directions for the management of his property for charitable purposes, and headed, "Directions to the executors of my last will, executed the 13th of February, 1879—How they are to manage my affairs." *Held*, that the will did not sufficiently describe the paper of directions as then existing, and that parol evidence was not admissible to identify it as the document referred to in the will, and the incorporation of the directions in the probate should be refused.—*In re Kehoe*, 23.

It seems that any written testamentary document in existence at the execution of a will may, by reference, be incorporated into and become a part of the will, provided the reference in the will is distinct, and clearly identifies, or renders capable of identification by the aid of extrinsic proof, the document to which reference is made.—*Brown v. Clark*, 61.

Two sisters, each of whom owned personal property in severalty, and who were also seized of real estate as tenants in common, executed one and the same instrument, which, after providing for the payment of their debts, continued: "Second, that all of our property, both real and personal, go to James Betts," and John Drue Betts and their heirs forever," and it then appointed an executor, and revoked "all former wills by us made," and ratified "this and no other to be our last will and testament." This instrument was presented for probate after the death of both sisters. *Held*, that it should be admitted to probate as the will of both; that it was, in effect, the separate will of each testatrix, and might have been revoked by either, in so far as it was her will; and that upon the death of either it might have been probated, as her separate will.—*Betts v. Harper*, 63.

See *Codicils; Joint Wills; Mutual Wills*.

UNDUE INFLUENCE.

The influence that will vitiate a will must be such as in some degree destroys the free agency of the testator, and constrains him to do what is against his will, but what he is unable to refuse, or too weak to resist.—*Waddington v. Buzby*, 2.

To make the influence exercised over a testator undue and illegal, it must be such as to destroy his free agency; it is immaterial how little the influence may be, if free agency is thereby destroyed.—*Rollwagen v. Rollwagen*, 11.

It is not sufficient to avoid a will that it results from the legitimate influence which affection or gratitude gives a relative over the testator. But if one take advantage of the affection or gratitude of another, to obtain an unjust will in his favor, using his influence to control and subdue the mind of the testator, so as substantially to deprive him of free agency, then the fact that affection or gratitude was the moving cause makes it no less a case of undue influence.—*Rollwagen v. Rollwagen*, 11.

A will may be contrary to the principles of justice and humanity,—it may be both unnatural and unjust,—yet, if it appears to have been made by a person of sufficient age to be competent to make a will, and also appears to be the free expression of a sound mind, it will be upheld.—*Middleditch v. Williams*, 3.

Influence operating on a testator in making his will is illegal only when it places the freedom of his will under some kind of restraint.—*Monroe v. Barclay*, 16.

To establish undue influence sufficient to invalidate a will it must be shown that the testator was coerced into doing that which he did not desire to do. The mere fact that in making his will he was influenced by immoral considerations does not amount to such undue influence, so long as the dispositions of the will express his actual wishes and purposes.—*Wingrove v. Wingrove*, 17.

To establish such undue influence it is not sufficient to show that a person has the power to unduly overbear the mind of the testator; but it must be further shown that that power was so exercised as to produce the will in question.—*Wingrove v. Wingrove*, 17.

To invalidate a will for fraud or undue influence, it must appear that the fraud or undue influence had some effect upon the testator in producing the very act of making his will.—*Monroe v. Barclay*, 13.

A will cannot be impeached for undue influence, unless the influence under which it is made is such and is so exerted as to induce a disposition by the testator of his property contrary to his own wishes and desires. It is immaterial how the influence was acquired, if it was exerted in a manner overcoming or destroying the free exercise of testator's will in the disposition of his property.—*Monroe v. Barclay*, 13.

The fact that the influences producing a will sprang from an unlawful marital relation between testatrix and legatee will not render the will void, unless such influences were exerted in restraint of the free exercise of her will by the testatrix.—*Monroe v. Barclay*, 13.

On the contest of a will the court refused to charge that if a man knowingly and wrongfully marries and cohabits in a state of adultery with a woman who is the lawful wife of another man, and by the influence of such marriage and cohabitation procures a will from her in his favor, and disinherit her real husband, that will is void for illegal influence. *Held* no error, for, unless the influence placed testatrix under some restraint overcoming her free agency, it would not invalidate the will, and such restraint could not necessarily be implied from the assumed facts, and that the question of the existence of such restraint was properly left to the jury.—*Monroe v. Barclay*, 13.

Undue influence may be shown by all the facts and circumstances surrounding testator, the nature of the will, his family relations, the condition of his health and mind, his dependency upon and subjection to the control of the person supposed to have wielded the influence, the opportunity and disposition to wield it, and the acts and declarations of such person.—*Rollwagen v. Rollwagen*, 11.

In 1871 testator, an uneducated man, who could neither read nor write, worth about \$700,000 in real estate, married a niece of his deceased wife, who for several years had been his housekeeper. At that time he was a confirmed invalid, having nearly lost the power of speech, and his infirmities increased until his death, in October, 1873. In the year 1872 it appeared from the evidence of his intimate friend that he could not speak a word, nor utter an intelligible sound. In April, 1873, he discharged his old business agent, and employed a brother of his wife, a man of no business capacity, to take charge of his property, and a large and expensive residence was purchased and furnished. In the fall of 1872, and again in June, 1873, the brother employed attorneys to draw wills for testator in favor of the wife, by which the residuary estate was tied up until his youngest grandchild should come of age, the brother being made trustee. The wife gave all the directions for making the will, claiming to understand the sounds made by testator, none of which were intelligible to the attorney, nor did testator at such time utter any

word or intelligible sound. In September, 1873, a codicil was drawn under similar circumstances, increasing the gift to the wife. None of testator's children or grandchildren were present at the execution of the wills or codicil, nor did it appear that they knew of them. *Held*, that it did not appear that testator understood and assented to the provisions of the instruments, and that they were procured by undue influence.—*Rollwagen v. Rollwagen*, 11.

Undue influence, in a case where no relation of trust exists, cannot be presumed.—*Middleditch v. Williams*, 7.

The facts that the draughtsman of the will is sole executor, and his wife and son are favored legatees, will not invalidate the will, where there is no more direct and certain evidence of fraud or undue influence, and the testatrix had excluded other relatives in a former will, and had given good reasons therefor, and the draughtsman, who was her nearest relative upon whom she could rely, had advised her in the care of her property, and assisted her in her business.—*Waddington v. Buzby*, 1.

The fact that the will was drawn by a favored legatee, while it calls for suspicious scrutiny of the circumstances, does not, of itself, invalidate the will.—*Waddington v. Buzby*, 2.

The declarations of a testator are competent to show the condition of his mind, but not to prove undue influence.—*Middleditch v. Williams*, 3.

Where the act of destruction of a will by the testator is produced by undue influence, the effect is the same as where a testator, not having testamentary capacity, destroys his will or codicil; the instrument destroyed stands unrevoked.—*Rich v. Gilkey*, 43.

Witnesses.

See Attestation; Evidence.

Women.

See Marriage.

WORDS AND PHRASES.

"Clause." A clause is a subdivision of a written or printed document. Words which, separated from the context, have no sense or meaning, do not constitute a clause.—*Eschbach v. Collins*, 51.

"End of the will." A statute requiring that a will be subscribed by the testator "at the end of the will" means, in the absence of controlling statutory declarations, a subscription at the actual physical termination of the instrument, and not at that portion thereof which testator intended to be the end.—*In re O'Neil's Will*, 39.

"Mariners." In the provision of the statute of wills, that no nuncupative will shall be valid, the exception in behalf of mariners includes the whole service, applying equally to superior officers and to common seamen.—*Hubbard v. Hubbard*, 25.

"Presence." Statute providing for attestation of a will "in the presence of" the testator does not, in some states, require absolutely that the witnessing must be done in the actual sight of the testator, nor yet within the same room with him; if the witnesses sign within his hearing, knowledge, and understanding, and so near as not to be substantially away from him, they are considered to be in his presence.—*Cook v. Winchester*, 31.

"Revocation." In a statute prescribing the manner in which a devise, or any clause thereof, may be revoked, "revocation" cannot be construed to mean mutation; it is not a synonym of alteration. To revoke a testamentary disposition means to annul it, and the revocation of a clause implies the destruction of that clause.—*Eschbach v. Collins*, 51.

"Sea." In legal parlance, waters within the ebb and flow of the tide are considered the sea.—*Hubbard v. Hubbard*, 25.

"Sign." The etymology of the word "sign" does not necessarily require the signing to be at the bottom of the instrument.—*Adams v. Field*, 36.

Signing a will at the beginning may, if so designed, be a sufficient signing, within a statute simply requiring that a will be "signed" by the testator.—*Adams v. Field*, 36.

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Author	Vol.
Reeves, Alfred.	
Title	Copy
Cases on wills.	
Date	Borrower's Name

